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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

DEBRA SUE JENNER,

Petitioner,

vs.

JAMES SMITH, Superintendent
Springfield Correctional Facility, and
MARK BARNETT, Attorney General,
State of South Dakota,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHAT IS THE CURRENT LEGAL MEANING FOR PSYCHOLOGICALLY INVOLUNTARY?

QUESTION:

Are admissions "voluntary" as a matter of constitutional law when

1. They were obtained after an eight hour unrecorded interrogation;
2. The police admitted to using deceit, psychological trickery and appeals to religion; and
3. They terminated the interrogation only when they believed the defendant was on the verge of a psychological breakdown?

II. SHOULD THE LENGTH OF AN INTERROGATION TRIGGER THE *MIRANDA* REQUIREMENT?

QUESTION:

Are these same statements admissible as a matter of constitutional law when

1. They are the fruits of an eight hour station house interrogation; and
2. The Defendant was never advised of her rights under the *Miranda* decision at any point?

QUESTIONS PRESENTED FOR REVIEW – Continued

III. ARE THERE SEPARATE STATE VS. FEDERAL STANDARDS ON APPEAL FOR REVIEWING THE CONSTITUTIONAL QUESTION OF "VOLUNTARINESS"?

QUESTION:

In resolving the federal constitutional question of "voluntariness" should a state supreme court be permitted to use the less stringent standard of a "review on the record" rather than the more stringent standard of "plenary review" which is followed by the federal courts.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Debra Sue Jenner, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on January 5, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the Appendix hereto, p. 104, *infra*.

The Memorandum Opinion and Order of the United States District Court for the District of South Dakota has not been reported. It is reprinted in the Appendix hereto, p. 91, *infra*.

The opinion of the Supreme Court of South Dakota is reported at 451 N.W.2d 710, and is reprinted in the Appendix hereto, p. 37, *infra*.

The findings of fact, conclusions of law and order regarding suppression motions of the Court of South Dakota for the Third Judicial Circuit has not been reported. It is reprinted in the Appendix hereto, p. 23, *infra*.

The memorandum opinion of the Circuit Court of South Dakota for the Third Judicial Circuit has not been reported. It is reprinted in the Appendix hereto, p. 1, *infra*.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 28 U.S.C. § 2254, the Petitioner brought this suit in the Southern District of South Dakota. On November 27, 1991, the Southern District entered a judgment of dismissal. See. p. App-91, *infra*.

On Petitioner's appeal, the Eighth Circuit on January 5, 1993, entered an opinion affirming the Southern District's Judgment of Dismissal. See p. App-104, *infra*. No Petition for Rehearing was sought.

On March 26, 1993, Justice Blackmun ordered that the time for filing this Petition for Writ of Certiorari be extended to and including June 4, 1993.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On March 15, 1988, Debra Sue Jenner, a young mother, was convicted of Second Degree Murder arising out of the death of her three and a half year old daughter. A major portion of the prosecution's case against Debra consisted of admissions she had made during an eight hour station house interrogation and evidence that flowed from those admissions.

Prior to trial, Debra timely contested the use of those admissions on the ground that they were "involuntary", and because they were obtained without benefit of her *Miranda* warnings.

She appealed her conviction to the Supreme Court of South Dakota specifically raising the issues of the voluntariness of her statements and her failure to be Mirandized.

In a close decision characterized by two powerful dissents, the South Dakota Supreme Court affirmed her conviction. Two justices of that five member Court wrote

that they believed that Debra had been subjected to an "intense psychologically coercive interrogation" while under a great deal of "stress and trauma" and while she had had little sleep; and that the use of these techniques caused Debra "to break down emotionally."

These justices also forcefully objected to the fact that Jenner was never advised of her *Miranda* rights, and stated that she could not have exercised her *Miranda* rights because she had not been advised as to what her rights were.

On May 16, 1990, she filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Dakota. After struggling with this case for twenty-one (21) months, U. S. District Judge John Jones denied the Petition for Habeas Corpus. However, in his opinion, the judge indicated that because of the lengthy interrogation, the fact that it took place at a police station, and because of the failure of the investigators to advise Mrs. Jenner of her *Miranda* rights the case presented "a very close question."

Mrs. Jenner appealed the denial of her Petition for Writ of Habeas Corpus to the Eighth Circuit where it was briefed and argued. On January 5, 1993, the Eighth Circuit entered an order affirming Judge Jones' Judgment of Dismissal.

On Application to the United States Supreme Court, Justice Blackmun, on March 26, 1993, extended the time for filing this Petition for Writ of Certiorari to and including June 4, 1993.

The issues throughout all these lower court proceedings related to two questions: First, the voluntariness of Mrs. Jenner's alleged admissions; and, second, the admissibility of those admissions despite the fact that she was not advised of her *Miranda* rights.

THE VOLUNTARINESS ISSUE

At the time of her interrogation, Debra Jenner had just lost her only daughter in a brutal and vicious murder. Only two days after her daughter's death, and on the same day that she had just returned from the funeral home after viewing her daughter's body, she was asked to come to the Public Safety Building to answer a "couple of questions" (SH:18).

On the day of her daughter's death, Debra had talked with police on five separate occasions, and as a consequence of all that had occurred, she did not sleep that night (SH:167). When Debra went to the police station the next day to answer questions, she unknowingly walked into a non-stop, hostile and relentless interrogation. She was interrogated in a room that measured 12' x 14', and that contained one table, three or four chairs, a filing cabinet, no outside windows and no clock or radio (SH:35-36). She was immediately separated from her husband.

The first officer who interrogated her accused her of being untruthful and of being responsible for the death of her daughter. Debra became very emotional and cried out she didn't do it – that she couldn't have done it (SH:81). Later, a second officer accused Debra of killing her

daughter (SH:68), which she denied. This officer repeatedly advised Debra that he did not believe her and made further accusations against her which she denied each time.

Debra had come into the police station at 1:30 p.m. on April 6, 1987. By 4:00 p.m., the police still had not obtained a confession so the first officer came back again and for a third time she was repeatedly accused of being responsible for the death of her daughter (SH:83).

This officer employed numerous methods of hostile and psychologically sophisticated interrogation. He told her that her son had said that she had spanked her daughter, Abby, the night before she died, which was not true (SH:84;87;174). He conjectured that if Debra's hair was found in Abby's hands, it would not be good (SH:87). He suggested that "there was a rational Debbie and an irrational Debbie, and that the irrational Debbie had killed her daughter" (SH:92).

After four hours of interrogation by two experienced police officers, Debra was frightened, horrified and confused. She would weep or cry out one moment and then she would become calm the next (SH:90-91).

Despite the fact that she had no familiarity with the law, the police never advised Debra that she could call an attorney or stop answering questions at any time. Nor did they tell her she could answer some questions and not others (SH:93). Neither then nor at any time later, was she ever told that she had the right to remain silent, the right to talk to a lawyer, the right to stop the questioning or that she was not required to be there.

At 5:00 p.m. following three and a half hours of relay interrogation and point blank accusations, because no confession had been obtained, a third officer was asked to take over the interrogation (SH:83).

This officer, who had been listening to the questioning on monitoring equipment in another room, began in a very sympathetic and apologetic tone. He asked that Debra promise to cooperate for the sake of her husband, her son and all the residents of Huron (SH:98). During the next several hours, the officer employed deceit, lies, psychological trickery and appeals to religion in an effort to get Debra to confess.

He told her there was a good Debbie and a bad Debbie (SH:422), and asked her to become the "bad Debbie" and tell him what the bad Debbie had done (SH:174). He prefaced questions by stating that Debra was a good mother, and he knew she was a good Christian, but "could it be possible that . . . ?" making suggestions he wanted her to speculate about (SH:127).

This officer repeatedly asked Debra to create and then describe various imaginary scenarios in her mind in order to visualize and be able to relate to him the gruesome details of the moments preceding Abby's death (SH:127).

When Debra requested that she undergo hypnotism, psychological help or truth serum (SH:100), he refused her request and told her that there was more she needed to tell him and that he would "jar" it out of her (SH:28).

He used Debra's religious beliefs to compel her to be "truthful" (SH:134), he told her that she should confess to

help Abby's little friends who were afraid (SH:176), and that the killer was mentally ill and that she was the killer (SH:174). He told her she should confess because "God is forgiving" and that he only hates the sin and not the sinner (SH:174:3-7).

The officer lied to her constantly. He told her that her husband was in the other room telling others that Debra was to blame (SH:131); that her husband would not sleep with her and did not want to touch her because she was filthy now because she had done this (SH:175). He told her that they had found her hair in Abby's hands (SH:175); that she should help her husband by confessing because he had failed a polygraph exam (SH:176); and that her husband had told them that she had killed Abby and that he had helped to cover it up (SH:179).

When these lies failed to produce a confession, the officer became visibly angry, and intimidated her by shouting at her even though she pleaded with him to stop yelling (SH:178). At one point when she was exhausted and on the verge of a breakdown, she asked him if she had done it. He shouted: "It's you, it's you, it's you, it's you!" (SH:197).

During the five hours that he interrogated Debra, she repeatedly denied her guilt. At times totally exhausted she would ask "Could I have done this and not know it? Could I have psyched out?"

Throughout, Debra's mood would fluctuate from calm to excitement to anxiety to distress, depending on the mood of the interrogator. At times she was highly distraught and at other times she would black everything out and show no emotion. She would stare up toward the

ceiling, her eyes were glassy and she would speak in a meek and distant voice. Once in total exhaustion, she held the officer's hand and laid her head on his lap and wept (SH:101-102).

At another point, in absolute frustration and agony, Debra pleaded "Why are you putting me through this? Isn't it enough losing a daughter?"

In the 48 hours since her daughter's death, Debra had very little to eat, and nothing to eat at all at the police station. She had slept only for a few hours on Monday night and only after someone had obtained a prescription for her.

During the interrogation, she was never left alone, nor told she could leave on her own accord (SH:15). She believed she had no right to leave (SH:173). She thought she was required to be there because she believed that was the way the process worked (SH:190).

After eight hours of interrogation, Debra had been kept from her own daughter's memorial service at church, and had no more details from the police than she did when she first spoke to law enforcement officers (SH:126). Throughout this ordeal, she never made an oral or written confession to the killing.

At approximately 9:00 p.m. after a day long interrogation, the officer became very concerned about Debra's physical and mental well being, and he feared that continuing the interrogation would have caused a serious breakdown (SH:110). He advised the other officers to get some help for Debra (SH:24) so they called in a psychologist for her.

At this point, the police decided to reunite Debra and her husband, but prior to doing so, one of the other officers untruthfully told her husband that Debra had confessed and wanted to see him (SH:133).

When the two were reunited, Debra asked her husband "Did I do it, did I do it?" (SH:180;214). The husband looked at the officer and, based on the lie told to him, he shook his head yes (SH:123). Debra crawled up on his lap and screamed and screamed, thinking that if her husband said she had done it, it must be true (SH:180). She asked him "You mean you knew all along and you covered it up?" He responded, "Honey, I don't know anything." Debra then turned to the officers and asked "You mean he could be blacking it out too?" (SH:201). At trial they used these statements against her.

After procuring this alleged quasi-admission, the officer took the husband from the room (SH:113;135). After the psychologist had arrived and visited with Debra, she was told for the first time that she could go home – or to the hospital (SH:158). This was the first time in eight hours that Debra was told she could leave.

One year later, at trial the officers resurrected bits and pieces of this eight hour unrecorded interrogation and testified as to what they perceived to be admissions made by Debra. Yet the principal officers' written report of this day long interrogation was no more than three to four pages (SH:223).

At trial these admissions, plus evidence derived therefrom, was admitted over objection and resulted in her being convicted for second degree murder.

REASONS FOR GRANTING WRIT

I. *THE CONSTITUTIONAL QUESTION OF VOLUNTARINESS*

This Court should grant the Petition for a Writ of Certiorari in this case for the following reasons:

A. There is currently no "bright line rule" as to when admissions obtained by psychological pressure become "involuntary" as a matter of law, and to avoid the potential for constitutional abuse in the future there should be.

B. As a matter of public policy and constitutional law, the test for finding statements "involuntary" should be no greater than the tests for invalidating a Last Will and Testament because of undue influence, a contract because of duress, or a guilty plea because it was not knowingly, intelligently and voluntarily made; yet under current law it is a much greater burden to meet.

C. As a matter of constitutional law and public policy admissions obtained during an interrogation which is terminated because the defendant is believed to be on the verge of a psychological breakdown should be constitutionally inadmissible.

1. NO BRIGHT LINE RULE.

This Court has never distinguished in its written opinions between the voluntariness of "admissions" as opposed to "confessions" and it should do so. Both the state and federal courts need a bright line rule as to when

admissions obtained by psychological pressure become involuntary as a matter of law.

This case is not about a confession. It is about sporadic admissions which were made by a vulnerable defendant who was subjected to a psychological barrage of tactics and techniques which squeezed out of her fragmentary utterances that were arguably incriminating.

There was no confession written or oral obtained in this case; although the police used every trick in the book to obtain one. When they could not do so they attempted to settle for admissions. When they failed to prompt any clear and unequivocal admissions from the defendant, they tried to trigger unguarded verbal responses which they later suggested at trial were admissions of guilt.

These admissions should not have been admissible because they were not knowingly, intelligently and voluntarily given and because they may not have been admissions at all.

An actual confession may or may not be voluntary, but on its face its contents usually reveal a clear and unequivocal admission of guilt. Admissions are different. Statements like those made by Debra – isolated remarks, comments made out of frustration or exhaustion, and concessions to hypothetical questions – do not have clear, unequivocal meanings. The meaning of each is usually hazy and unclear, and can only be extrapolated by reviewing the entire context of the conversation in which it was given and the conditions under which it was made. In this case, the context was impossibly foggy and unclear because the conversation dragged on for eight hours and was not tape recorded in whole or in part.

Likewise, the conditions under which the statements were made make the statements unreliable because they were designed to induce isolation, fear, repentance, remorse and self-incrimination. The conditions in this case were designed to induce anything but statements made in a knowing, intelligent and voluntary manner.

These admissions were coerced out of Debra as a direct and proximate result of the direct accusations made against her, the deliberate lies that were told to her, the psychological suggestions made to her, the twisted use of hypothetical questions asked of her, the creation of artificially contrived scenarios, the isolation from her family, the length of her confined interrogation, the invasion of her sex life with her husband, the appeals to her feelings for the community and Abby's friends, the playing upon her religious convictions, and the emotional inability to resist or to think clearly caused by the death of her daughter.

Her statements were the fruits of an interrogation in a confining room, where in eight hours, she was permitted only two trips to the restroom and one to get a Diet Coke. These admissions were the creation of police suggestions that she had blacked out any memory of her actions. The police tried, in effect, to brainwash her into believing despite her inability to remember or admit anything about the murder, she had, in fact, committed the murder. Rather than obtaining a confession, the police obtained only concessions that Debra might be "blacking it out" (their suggestion), or that it could be possible that she did it and did not remember it (again, their suggestion).

Where an actual confession is obtained, these kinds of techniques may cross the line between "permissible police conduct" and "methods offensive to due process." *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). These techniques are even more offensive, more dangerous and more unfair when used to induce simple statements, hypothetical answers, or other abbreviated admissions for incriminating purposes. The danger and unfairness is compounded further when the statements are made during the course of a lengthy station house interrogation, and they are not recorded or preserved in any reliable way.

This Court has held that the voluntariness of a defendant's statements is to be determined from the totality of the circumstances. The totality of the circumstances generally requires an examination of both (1) the details of the interrogation and (2) the characteristics of the accused. *Schneckloth v. Bostamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The *Schneckloth* test, however, does not significantly treat the question of "admissions" made in this context. While Debra repeatedly denied killing her daughter, at times totally exhausted she would ruminate "Could I have done this and not know it? Could I have psyched out?" Far from being reliable admissions by a party defendant, these statements evidence a young lady whose resolve was crippled by deception, suggestion and fatigue. She was deliberately being made to doubt her own memory by the police – and even her own sanity. Yet these frailties were introduced against her.

At one point she asked to be hypnotized and for psychiatric help. As Justice Sabers of the South Dakota Supreme Court wrote, "While these statements are relevant in considering the totality of the circumstances . . . If anything, these statements indicate Jenner's emotional breakdown, rather than any desire to make a voluntary statement" (S.D.S.C. Opinion, App. 83).

In considering the important concept of voluntariness this Court has commented:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Schneckloth v. Bostamonte*, 412 U.S. 218 at 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Yet, this test relates only to "confessions" which are generally easy to examine. On their face, confessions reveal important clues as to whether they are voluntary or freely made, or the product of physical or mental coercion.

On the other hand, admissions are not so revealing. While generally not the product of physical coercion, they frequently can be nothing more than the inadvertent, ambiguous, involuntary response to a suggestion, question or promise. As such, simple admissions should be reviewed with much more scrutiny utilizing a different test – a test this Court has yet to articulate.

2. TOO GREAT A BURDEN

It is a maxim of American justice that it is better to allow ten guilty people to go free than to convict one innocent person. Unfortunately, under the strict interpretation of this Court's recent cases, while this maxim might be theoretically true, it is difficult to imagine that such is actually the case.

Under recent criminal cases with respect to "involuntariness" this Court has established a more difficult burden for a defendant to meet in order to have statements excluded as involuntary than it has required for civil proponents in meeting almost identical burdens in cases where liberty is not involved.

The checklist for involuntariness under *Schneckloth* is exhaustive. The factors this Court requires lower courts to consider before excluding a confession as involuntary include physical punishment, lack of sleep, lack of food, detention, and a litany of others. Yet in other cases involving "undue influence" with respect to the making of a Last Will, or "duress" with respect to the making a contract, this Court is far less demanding in terms of the factors that must be demonstrated to set aside a Will or to void a civil contract as not being the product of a voluntary act.

The cases are far too numerous to compare or contrast here. This Court has simply to review the tests it has established in those civil areas to observe the difference. While a disparity in burdens should exist, it should exist in the other direction. When liberty is at stake, the burden

should be much less stringent than when only inheritances or contract rights are involved.

Even within the criminal law area there is an inexplicable disparity between the tests propounded by this Court. While admissions are considered involuntary only when a defendant established that his will is overborne, such is not the case with respect to guilty pleas.

Like statements made under interrogation, guilty pleas are acceptable only when knowingly, intelligently and voluntarily made. Yet guilty pleas are frequently set aside on the simple showing that some possible threat, promise or other collateral inducement may have influenced the defendant to enter a guilty plea. While the words are the same, the test is much different.

For a person who wants to plead guilty, the Court has been overly cautious, but for the person who asserts his innocence, the Courts have been far less concerned. Again, the cases on the voluntariness of guilty pleas are numerous. Yet, a simple comparison between the existing standard for reviewing "voluntariness" in that context discloses a salient distinction which imposes a much greater burden on a defendant who asserts that his statements made during a hostile interrogation are involuntary.

At worst, this disparity amounts to a denial of equal protection and, at best, to a policy that discriminates against those who consent to being interrogated by the police.

3. TERMINATION BASED ON PSYCHOLOGICAL CONCERNS.

No confession was obtained in this case because the defendant's interview was terminated by the police. The facts are not in dispute. The police, by their own admission, ceased interrogating this defendant because they believed she was on the verge of an emotional breakdown. In fact, their concern was so substantial that the police themselves called in a psychologist to examine the defendant with respect to her emotional condition.

So concerned were the police about what psychological havoc they had inflicted on the defendant that after the psychologist had examined her they advised her that she was free to go to her home or to a hospital.

Yet, despite the fact that this interrogation had turned the defendant into an emotional basket case the lower courts, following the tests articulated by this Court with respect to voluntariness, ruled that the defendant's admissions during this same interrogation were admissible.

If the lower courts did, in fact, faithfully follow the tests imposed by this Court, then how can these tests advanced by the U.S. Supreme Court be fair? How is it that, despite the fact that an interrogation must be terminated because a defendant is psychologically incapable of going further, her statements can nonetheless be deemed to be voluntary?

The undisputed facts in this case mean either that the lower courts were in error in following the precepts of this Court or that the precepts of this Court have not yet

been fully articulated to take into account the tragedy that occurred here.

II. EXTENDING THE *MIRANDA* RIGHTS.

This Court should grant the Petition for a Writ of Certiorari for the following additional reasons:

A. Despite the fact that an interrogation may originally be non-custodial when it is conducted inside a police station for eight hours without a lawyer, the police should be required, as a matter of law, to advise an unsophisticated defendant of her Fifth and Sixth Amendment rights under *Miranda*.

B. Unless a defendant is advised of her *Miranda* rights or clearly demonstrates that she is aware of those rights, any statements made by the defendant in a lengthy station house interrogation should be inadmissible because the defendant without knowing her rights cannot knowingly and intelligently waive them.

1. NON-CUSTODIAL STATION HOUSE INTERROGATIONS.

The facts in this case cry out that the Supreme Court should hold that lengthy station house interrogations are inherently custodial and should require that *Miranda* rights be explained.

U. S. District Judge Jones held that because of the length of the interrogation and because it was conducted in a police station, it was a close question as to whether *Miranda* should have been followed, but he still found

that the *Miranda* rights were unnecessary. As the current state of the law exists, perhaps he was correct. However, as a logical and practical matter, how can a young mother, unsophisticated as to all the intricate aspects of the law be aware of the fact that she has a right to remain silent, that she has a right to a lawyer, and that she has a right to stop the questioning at any time unless somebody tells her about these rights.

Interviews conducted in private homes or outside of automobiles are inherently noncustodial unless the person is advised he is under arrest. Yet a person inside a police station, detained for eight hours for the purpose of extracting evidence from that person for the purpose of building probable cause to arrest, is inherently in custody.

When Mrs. Jenner went to the police station, she was told it was only to answer a couple of questions. She was kept there, isolated and alone for a period of eight long hours during which she was aggressively and deceptively interrogated in order to cause her to incriminate herself. She did not have the remotest idea that the Constitution gave her the absolute right not to incriminate herself. Operating on the false premise that she had to cooperate with the police, she at first agreed to be interviewed. However, what took place thereafter can be considered nothing less than a "de facto" or "constructive" custodial interrogation.

While she was never told she was under arrest, she was never told she could leave. Nor was she ever told that she could refuse to answer questions. In her mind,

her freedom was outweighed by her perceived obligation to the demands of the police.

Debra was never told that the police had no authority to keep her separated from her husband, to keep her from attending her daughter's memorial service or to keep her from leaving the interrogation room.

In her testimony, she indicated she never believed she had the right to leave. When the interrogation grew exceptionally hostile, she cried, "Why are you putting me through this? Isn't it enough to lose a daughter?" (SH:121). Instead of advising Debra she was free to discontinue the interview, the officer advised her that he *had* to continue (165:1-8). How could Debra have thought otherwise?

For all practical purposes, Debra Jenner was subjected to a custodial interrogation. The investigation was focused exclusively on her. The interrogation was hostile and accusatory, conducted in a small room behind a closed door, beyond which she was permitted to exit only twice.

More significantly, the sole purpose of the interrogation was to obtain a confession from her, not to gather further useful general information as is usual in most non-custodial interrogations.

What happened to Debra Jenner is typical of what happens in most lengthy "non custodial" station house interrogations, and should persuade this Court to extend *Miranda* to these situations.

> We must remember in this regard that *Miranda* came down some 27 years ago. In that time, law

> enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling to satisfy *Miranda*'s requirements. *Withrow v. Williams*, 1993 WL 119753, citing *Quarles*, 467 U.S. at 663.

First, Debra was not only separated from her husband, but from her parents and minister as well. She was kept in a small, windowless room for eight hours, and never permitted to make a phone call. The atmosphere was totally police dominated by her all male police interrogators. She was never advised of a termination time for the interrogation, nor was she told that her cooperation was to be totally voluntary. More importantly, because of her gender, status, lack of sophistication and vulnerability caused by the death of her daughter, she was especially susceptible to police intimidation and suggestion.

Other than actually being placed under arrest, her interrogation could not have been more custodial. In her mind, her freedom of action had been curtailed in almost every way imaginable. She was trapped in an Inquisition, and her failure to confess was the only reason that the Inquisition continued.

To the ordinary citizen, the police station has all of the trappings of an inquisitional chamber. To protect the citizen once inside that chamber, this Court should require that *Miranda* rights be given whether or not she is officially placed under arrest if she is detained at a police station for almost eight hours.

In 1937, an Oxford Don wrote an illuminating history referencing the dangers and stark horror of similar interrogation techniques.

> The function of the Inquisition was a double one: it existed not only to detect and punish crime, but also to save the soul of the criminal. In order to achieve the latter end, it was essential that the accused should confess his guilt, profess repentance and extract pardon. If the prisoner refused to confess voluntarily, steps must be taken to persuade him to do so. (The Spanish Inquisition, Cecil Roth, W. N. Norton, London 1937.)

In effect, the police, by appealing to Debra's religious convictions, her Christian beliefs, and by talking about God's forgiveness of her, were suggesting to her that she could save her soul only by confession. Yet, the police never told her that the same Constitution that gave her freedom of religion also guaranteed her the right to remain silent.

2. HOW DOES A PERSON KNOWINGLY WAIVE RIGHTS SHE IS IGNORANT SHE HAS.

Law professors, critical of the Courts, have written that appellate tribunals frequently utilize the most convoluted legal reasoning just to save a conviction. Without regard to the general truth of this statement, their criticism is certainly on the mark in this case. Here, in order to avoid reversing Debra's conviction, the Courts had to find, as a matter of law, that Debra Jenner knowingly,

intelligently and voluntarily waived certain constitutional rights that she never knew she had.

Without regard to whether a person is in custody every person has a right to remain silent, the right to talk to a lawyer for advice, and the right to terminate the questioning at any time. In order for statements made by that person to be admissible against her, that person must not only consent to be interrogated, but must consciously waive her constitutional rights.

In this case, the Defendant was never Mirandized, nor does the record disclose that she even understood her rights. Nor does it clearly reflect that the defendant, by her actions, somehow waived the rights that she was guaranteed.

If Deb Jenner's constitutional rights are to mean anything at all, this Court should grant certiorari so it can require police to advise individuals subjected to lengthy interrogation inside a police station of their Fifth and Sixth Amendment rights under *Miranda*. To be admissible, any statements made by that person should be admissible only after that person has been informed of her *Miranda* rights or has clearly demonstrated, through her words or deeds, that she understands those rights and intends to waive them.

The failure to Mirandize Deb Jenner troubled U. S. District Judge Jones and also deeply disturbed two justices of the South Dakota Supreme Court. As the primary guardian of Constitutional liberties in this country, this Court should be disturbed as well.

In cases involving police station interrogation, this Court's "totality of the circumstances" test is simply inadequate because it provides a back door excuse for police to override the rights of a defendant by inducing admissions from that defendant which they can use to convict her by claiming the interrogation was non-custodial.

How could Debra Jenner under *any* circumstances know she was free to leave if she was never advised of that fact? How could she know she had a right to remain silent or that she could discontinue the interview at any time unless those rights were explained to her?

In his persuasive dissent, Justice Morgan of the South Dakota Supreme Court did not rely on convoluted reasoning when he wrote:

> One of the trial court's findings is enigmatic in that it first finds that neither of the Jenners were advised of their *Miranda* rights; and further, that neither requested counsel, or that the questioning stop and never refused to answer a question. It is incomprehensible that any court could conclude that Debra's cooperation could be evidenced by her failure to exercise her *Miranda* rights when she had not been advised of those rights. (S.D.S.C. Opinion, App. 72.)

The salient fact that has been ignored in this case is that at no time does the record disclose that Debra made a knowing, intelligent and voluntary waiver of her rights by virtue of her own conduct.

Whether or not a person is in custody, this Court should demand, at a minimum, that any waiver must be clearly and unambiguously made, and that the record

should reflect an unequivocal waiver. This requirement should be all the more urgent when the person making the statements is inside a police station for almost eight hours.

Judge Jones was forced to affirm Debra Jenner's conviction because he had no language from this Court to allow him to reverse it. The Eighth Circuit, in following *Miranda* has held that *Miranda* warnings are only required if the person is subjected to custodial interrogation. In other words, the person must be in custody or otherwise deprived of his freedom of action in any significant way before a questioning officer is required to read the person his *Miranda* warnings. *U. S. v. Carter*, 844 F.2d 37 (8th Cir. 1989).

The key language here is "otherwise deprived of her freedom in any significant way." To find that Debra Jenner's freedom was not deprived in any significant way when she was subjected to such a psychological coercive interrogation for over eight hours inside a police station is to resort to convoluted reasoning only to save a conviction.

More importantly to so find not only makes a mockery of logic and the English language, but it encourages police inside the station house to circumvent the Fifth and Sixth Amendments and to literally seduce incriminating statements out of unsuspecting individuals. This type of action is certainly constitutionally suspicious when it involves confessions. However, it is even more dangerous when it involves simple admissions that, one at a time, unknowingly slip out during a lengthy interrogation.

Deb Jenner was convicted by her own unknowing and unguarded statements which the police unfairly weaved together into a mosaic almost a year after her interrogation, which distorted the true meaning of her words and glossed over the actual context in which they were made.

The function of the United States Supreme Court is to act as a guardian of our constitutional liberties and not to act as a shield for those who seek to erode those liberties a little bit at a time.

III. SEPARATE STANDARDS FOR REVIEWING FEDERAL CONSTITUTIONAL STANDARDS.

A. To avoid a dual system of justice, state Supreme Courts should be required to review on appeal federal constitutional questions concerning the voluntariness of statements using a "plenary" review, as do the federal courts, and not a "review on the record."

It is the Defendant's position that her conviction was affirmed by the Supreme Court of South Dakota employing the wrong standard of review involving the federal constitutional issue of the voluntariness of her statement. The South Dakota Supreme Court in resolving this question used the "clearly erroneous" standard of review. This standard was improper.

The issue of voluntariness of confession is a legal inquiry requiring plenary review. *Russell v. Jones*, 886 F.2d 149, 151 (8th Cir. 1989).

Writing in *Miller v. Fenton* (Fenton II), 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985), Justice O'Connor stated:

> The nature of the inquiry itself lends support to the conclusion that "voluntariness" is a legal question meriting independent consideration in a federal habeas corpus proceeding. Although sometimes framed as an issue of psychological fact . . . the disposition question of the voluntariness of a confession has always had a uniquely legal dimension. This hybrid quality of voluntariness inquiry, subsuming as it does a "complex of values" in itself militates against the question as one of historical fact.

The question of voluntariness raised on appeal to the South Dakota Supreme Court was of federal constitutional dimension. While the South Dakota Supreme Court is free to adopt any standard of review it chooses in interpreting its own Constitution, it is bound to follow the standard of review dictated by the Supreme Court of the United States in examining questions arising under the United States Constitution.

Under a properly conducted plenary review in the South Dakota Supreme Court, that court's determination as to voluntariness might well have been different than the determination made by Judge Jones.

The South Dakota Supreme Court is an appellate tribunal composed of five appellate justices and Deb Jenner was entitled to have that Court follow the appropriate standard in deciding her case.

As a matter of public policy, both Congress and this Court have taken steps to curtail the inundation of federal habeas corpus petitions arising out of state prosecutions. In order to effectuate that policy, this Court could, by its decision in this case, significantly reduce the number of these appeals by requiring state supreme courts to employ federal standards of review for the thousands of cases they review involving federal constitutional issues. Such an action would greatly reduce the flow of cases to the federal courts arising out of state prosecutions; and it would make review of those remaining state cases much easier and much less time consuming for the federal courts to consider.

If the Court does not accept certiorari on "voluntariness" or "*Miranda*" grounds, it should do so nonetheless if only to remand this case back to the Supreme Court of South Dakota so it can redetermine the issue of voluntariness with instructions to specifically conduct a plenary review of this issue utilizing the federally adopted standard of plenary review.

CONCLUSION

It is respectfully submitted that for important reasons of constitutional law and public policy, this Court should grant the Petitioner's request for a Writ of Certiorari. Unresolved and difficult questions concerning issues with respect to *Miranda* and "voluntariness" continue to inundate both state and federal rules.

This Court can stem the tide of that flood by adopting and articulating a bright line rule for both of these

issues using the facts and circumstances presented to it arising out of this case.

Our system of criminal justice envisions an investigatory rather than an inquisitional approach designed to insure that no accused shall be compelled to incriminate himself. While the framers of our Constitution gave us that right, only the United States Supreme Court can make it sacrosanct.

It is the Supreme Court and not the police who should establish the parameters of our liberty in America. This Court should zealously guard that responsibility and not inadvertently delegate it to the police one case at a time.

Respectfully submitted,

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APPENDIX

1/29/88 MEMORANDUM OPINION
Eugene L. Martin, Circuit Court Judge
South Dakota
RE: 1/6/88 Suppression Hearing.....App. 1

3/16/88 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE: SUPPRESSION MOTION
Eugene L. Martin, Circuit Court Judge.....App. 23

2/14/90 SUPREME COURT OPINION/SOUTH DAKOTA
451 NW 710.....App. 37

9/27/91 U.S. DISTRICT COURT/SOUTH DAKOTA
JUDGMENT OF DISMISSAL & MEMORANDUM OPINION AND ORDER
USDC Judge John Jones.....App. 91

1/5/93 U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT OPINION..... App. 104

CIRCUIT COURT OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT
P.O. BOX 1358
HURON, SOUTH DAKOTA 57350
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Chambers of
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Circuit Judge [SEAL]

PATRICIA J. SCHNIDER
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January 29, 1988

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Re: State vs. Debra Sue Jenner

MEMORANDUM OPINION

(Filed Jan. 29, 1988)

Gentlemen:

The Defendant has moved to suppres [sic] any and all statements made by the Defendant during the course of an interview conducted by law enforcement on April 7, 1987. The grounds for the motion are:

1. That the statements were not freely and voluntarily given by the Defendant, thus violating her rights under the 5th and 14th amendment to the United States Constitution; and

2. That the interrogation was custodial and therefore the Defendant should have been advised of her legal rights under *Miranda*.

The State concedes that the Defendant was not advised at any time of her legal rights under Miranda but that the interrogation was not custodial and that any and all statements were voluntary.

The hearing on the Suppression Motion transpired on January 6, 1988 at the Beadle County Courthouse and was open to the public. Present were Dennis Holmes and John Bastian representing the State of South Dakota; the Defendant, Debra Sue Jenner, and her attorneys David Gienapp and William Matheson.

FACTS

1. The death of Defendant's daughter occurred on or about April 4 or 5, 1987.

2. On the morning or [sic] April 5, 1987, Beadle County Sheriff, Tom Beerman, spoke with the Defendant and her husband, Lynn Jenner, at the Huron Regional Medical Center. Defendant's husband did most of the talking. Sheriff Beerman spoke with them about ten minutes and said he would get back to them. Around 2:30 p.m. that afternoon Deputy Sheriff Jim Sheridan obtained a written consent from Lynn Jenner to search the Jenner residence and also one of the Jenner vehicles. (State's Exhibit 2)

Later that same day Jerry Lindberg, DCI agent, called Sheriff Beerman to see if the Jenners would talk with him. Sheriff Beerman then called the Jenners and talked with Lynn Jenner and advised him that Mr. Lindberg would like to speak with them. Sheriff Beerman also advised that Lindberg was a DCI agent. Both the Defendant and her husband agreed to come down to the police station to speak with Lindberg. Between 9:00 and 9:30 that evening the Defendant and her husband came to the police station voluntarily and on their own. Lindberg interviewed both Defendant and her husband separately. The interviews lasted a total of 45 minutes to one hour. Both the Defendant and her husband were very cooperative. After the interviews the Jenners went to their residence and provided law enforcement with the clothing that they had been wearing on the evening of April 4. They also provided hair samples. On this date Lindberg had also interviewed other people besides the Defendant and her husband.

3. On April 6, 1987, at about 8:12 a.m. the Defendant called Sheriff Beerman at his office. Later that morning Beerman returned the call to the Defendant at the residence of Lynn Jenner's father. Defendant stated, "You probably won't believe this but my ring has not been washed or scrubbed and that the investigators could have it." Later the Defendant gave the ring to Captain McQuillen of the Huron Police Department at the Funeral Home. On this day the Defendant's husband also turned over some jewelry to law enforcement.

4. On April 7, 1987, sheriff Beerman called Lynn Jenner and asked that he and his wife come down to the Sheriff's office. The Jenners agreed and came to the Sheriff's office

on their own. Accompanying the Jenners were Lynn Jenner's parents as well as Reverend Darrell Wagner of the Wesleyan Church. Both the Defendant and Lynn Jenner were given polygraph tests separately and alone.

Prior to the test being given Lindberg spoke with both the Defendant and her husband. They were advised as follows:

(A) They did not have to talk with him if they did not want.

(B) They did not have to take the polygraph test if they did not want.

(C) The test as being used as an investigator's tool and that the results could implicate or eliminate them as suspects.

(D) If they did not pass the test they would be asked more questions.

(E) Defendant admitted during her testimony that she was told that the test could not be used in court.

The Defendant asked Lindberg if the test would be accurate considering her emotional state. Lindberg told her that the emotional state she was in would have no bearing on the testing. Both the Defendant and her husband agreed to take the test. Further, the Defendant signed a consent form to take the polygraph examination. (State's Exhibit 1.) The consent form provides basically that the Defendant voluntarily agrees to take the examination; that no threats or promises have been made or duress or coercion exerted to induce her to take the examination; that the technique will be fully explained to her and that

all questions will be reviewed with her prior to the examination; and that she authorizes the release of the results of the exam, and any recordings, statements, or conversations regarding the interview to Jerry Lindberg, DCI.

DCI Agent Fred DeVaney, polygraph examiner, met with the Defendant and explained the polygraph examination to her. DeVaney also advised the Defendant that she did not have to take the polygraph test, that all the questions would be reviewed with her, and that the results would be released to Lindberg. The Defendant agreed to take the test. A pre-test was conducted using cards as the testing tool. The test started around 2:15 p.m. and lasted until around 3:30 p.m.

5. The examination-interrogation room was 12 foot by 14 foot; had one table and three or four chairs; a filing cabinet; no windows to the outside; a one-way glass window; no clock; no taping equipment or radio. The door was shut during the polygraph examination and then during the subsequent questioning was slightly open between three to five inches. The room was "bugged."

6. After the polygraph test DeVaney left the room for approximately 15 minutes. The Defendant was left alone in the room. DeVaney came back into the room after reviewing the charts and told the Defendant that she had lied. He confronted her with having been responsible for the death of her daughter. The Defendant became very emotional stating she didn't do it, she couldn't have done it. Later, Lindberg came into the room and talked with the Defendant for approximately 20 minutes discussing the accuracy of the polygraph examination. Lindberg told the

Defendant she had failed the test and accused the Defendant of killing her daughter. DeVaney then returned and talked with Defendant until about 5:00 p.m. DeVaney again told the Defendant that he felt she was responsible for the death of her daughter. He stated that Stewart (Defendant's son) had said that the Defendant had spanked Abby (victim) on the night of the incident. DeVaney also told the Defendant that *if* the Defendant's hair was found in Abby's hands this would not be good. He further advised Defendant that there was a rational Debbie and an irrational Debbie; that the irrational Debbie did the deed and that he wanted the truth about the irrational Debbie. Defendant stated, "The only way I could have done it is if I psyched out."

During this period of questioning DeVaney on one occasion left the room and upon returning found that the Defendant had gone to the bathroom and then returned to the interrogation room. DeVaney asked the Defendant if she wanted a coke and the Defendant requested a diet coke and DeVaney got her one. During the interviews with DeVaney Defendant's mood would swing to the extremes. There were times when she would cry; times when she would be calm and collected. At one point the Defendant wanted to know if DeVaney was a psychologist and if she could be hypnotized to see if she could remember what happened.

Around 5:00 p.m. DeVaney asked Agent Ken Giegling to take over because he wasn't being successful. DeVaney introduced Giegling to the Defendant and the Defendant agreed to talk with Giegling. Giegling had sat in the outer office listening (phone set) to the interviewing and was

making notes. DeVaney and Giegling had worked together as an interviewing team for several years.

Giegling told the Defendant that she was not being truthful and that she knew more than she was telling. During the interview Defendant stated, "Could I have done this and not know it? Could I have psyched out?" Defendant further stated that she also would like to find out and suggested hypnotism, truth serum, or to see a psychiatrist. After further questioning the Defendant stated, "I may have psyched out during the night." During the interview Defendant's mood would fluctuate from calm to excitement to anxiety and distress. At times she was highly distraught and at other times she would blank everything out and show no emotion whatsoever. At one point she held Giegling's hand and even laid her head on his lap and cried.

During this interview the Defendant stated she was going to tell Giegling something she never told anyone before and that was when they came home Lynn had closed the drapes and the door. Giegling told the Defendant that he knew she was responsible for the death of her daughter; that there was a good Debbie and a bad Debbie; that there is more there and "I am going to get it out of you." Also, he would preface some questions with the fact that the Defendant was a good mother and christian and then go on to ask the question. At one point the Defendant stated, "Why are you putting me though [sic] this it's bad enough to lose a daughter." Giegling stated that he was doing his job. There were times when Giegling would yell at the Defendant.

7. During the interview with Giegling the Defendant made statements on four separate occasions wherein she perceived the incident through the eyes of another. On the first occasion she volunteered a statement about seeing the incident through the eyes of her daughter. Defendant stated, "Abby knew the person and was not afraid. Abby saw a knife." When asked to describe the knife the Defendant held her hands apart about 8 inches and said the handle was wooden and it was Chicago Cutlery. At this time the Defendant was staring at the ceiling and her eyes were glassy and she spoke with a different voice. On the second occasion the Defendant again started speaking of seeing the incident through the eyes of her daughter and Giegling asked, "Is that person leaning over your daughter, you?" Defendant stated, "I think so." On a third occasion the Defendant stated, "Abby saw a black object." Defendant further stated there was a black airplane belonging to her son, Stewart. The airplane was in the kitchen area. At this point Deputy Jim Sheridan got a search warrant from Lynn Jenner (State's Exhibit 3) and the officers went out to the residence and found the airplane where the Defendant had indicated it would be. On the fourth occasion the Defendant perceived these events as being seen from the corner of the room and stated she saw a person with a knife.

Defendant testified that the statements made on these four occasions were the result of suggesions [sic] and requests by Giegling that she do this.

8. I find that the statements made by Defendant on the four occasions refered [sic] to in paragraph number seven above, were volunteered by the Defendant and not made pursuant to any questions asked to her by anyone.

9. Giegling ended the interview sometime between 9:30 and 10:00 p.m. because he felt the Defendant was going to have a nervous breakdown. Duane Majeres, local psychologist, was called immediately and arrived sometime between 9:30 and 10:00 p.m.

10. When the Defendant and her husband were reunited, the Defendant stated, "I did it, I did it." She then said to her husband, "Did you help me?" Her husband stated he did not help her.

11. Duane Majeres, psychologist from Community Counseling in Huron, was called and arrived between 9:30 and 10:00 p.m. Upon entering the Correctional Facility he heard a wailing sound. He was introduced to the Defendant and after speaking with her determined she was not suffering from psychosis and had no suicidal propensities. The Defendant was clearly responding. Further that the Defendant's previous interviews had minimal affect on her and she was very much under control.

12. The Defendant asked to go home and was allowed to do so by law enforcement. She was taken by Duane Majeres and Jim Sheridan to the home of Reverend Darrell Wagner. During the trip the Defendant appeared quiet and reserved.

13. Debra Sue Jenner, Defendant herein, testified that she is 31 years of age; that she is an agri-research technician and had an associate degree from college. She stated that concerning the April 7 interview, she had never been interviewed by law enforcement before; she had not slept much the night before and had taken a prescription to sleep; she ate no food on April 7; she had gone to the

funeral home that day; and that a memorial service was planned that evening.

Concerning the polygraph tests she admitted she was advised she did not have to speak to anyone; that she would not have to take the polygraph test; and that the test results could not be used in court. She did not dispute that her taking the polygraph test was totally voluntary. Further, she never told Lindberg or DeVaney that she did not want to take the polygraph test; that she wanted an attorney; or that she wanted the questioning to stop at any time.

Concerning the subsequent questioning she testified she was told that she did not have to talk to anyone unless she wanted. She testified she was not threatened or restrained in any way. She never requested to leave at any time.

Defendant did testify that she felt she did not have the right to leave because she felt it was a necessary part of the process. As a finder of fact I specifically reject this testimony as I find it unpersuasive and I simply do not believe it.

Defendant further testified that she voluntarily went to the Correctional Center, voluntarily provided hair samples, clothes and jewelry; that she knew her husband had given permission for searches.

Defendant also testified that DeVaney told her that the person who did this was mentally ill and that person was the Defendant. Further that DeVaney stated, "Why do we find long blonde hair in Abby's hand? Are you filthy to your husband now that he knows you did it? Don't you

want to help Lynn, Stewart, Abby's little friends who are afraid, the people in the community who are besieged with fear that there is a mad killer loose?" DeVaney denies questioning the Defendant in this manner.

14. The Defendant was not told that the interview could be stopped at any time or that she could leave at any time and was never told that she could contact an attorney.

15. The Defendant was given the polygraph examination and subsequently questioned from around 2:15 p.m. to around 9:30 p.m. that evening. The interrogation was not taped.

16. After the Defendant was reunited with Lynn she asked her husband if she had done it. Lynn nodded affirmatively. At this point the Defendant screamed and got up on Lynn's lap and shook him and stated, "Did you know this and cover it up?"

17. Lynn Jenner testified that he is 31 years of age and works for Farmer's Cashway Lumber. That he took his son Stewart to Dr. Paul Byrd, clinical psychologist, on April 6, 1987. Further that on April 7th he went to the Correctional Facility and voluntarily took a polygraph exam. After the test the examiner stated to him that he was not being completely honest. The examiner stated, "If you are a christian how can you go to heaven and be a liar?" Lynn Jenner was interviewed by different people, including the polygraph examiner, Lindberg, and another investigator names Muller. Further, that at one point Jim Sheridan came down and stated that the Defendant had confessed and Lynn broke down and cried as did his parents and the pastor. Jim Sheridan testified that he never made this statement to Lynn that the Defendant

had confessed but rather he did say that the Defendant had made some admissions.

When the Defendant and Lynn were reunited the Defendant asked Lynn if she had done it and Lynn stated "Yes." Lynn testified that he made this statement based on what he had heard Jim Sheridan say. Lynn further testified that when he and the Defendant were reunited the Defendant looked exhausted and drained.

18. Lynn Jenner testified that up through and including April 7, 1987, he and the Defendant were fully cooperative including interviews, searches, polygraph tests, and the turning over of jewelry and clothes. During this time no threats of physical violence were made against he or the Defendant.

19. That no time relevant herein were either the Defendant or Lynn Jenner ever advised of their Miranda rights. Further, neither the Defendant nor her husband ever requested the services of an attorney; never requested that the questioning stop and never refused to answer any question.

20. The Defendant was indicted by a grand jury and arrested on August 28, 1987, which was the first time the Defendant was physically taken into custody.

LAW

The United States Supreme Court in the leading case of *Jackson vs. Denno* (1964) 12 Law Ed.2d 908, made it clear that the Defendant in a criminal case is deprived of due process if his convictions is founded in whole or in part, upon an involuntary confession without regard for the

truth or falsity of the confession, and that equally clear is the defendant's constitutional right at some stage of the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination of the issue of voluntariness, which determination is to be uninfluenced by the truth or the falsity of the confession. The Court additionally held that the burden of prove is on the State to establish the voluntariness of the confession beyond a reasonable doubt. Also see *State vs. Thundershield* (SD 1968) 160 N.W.2d 408.

I. VOLUNTARINESS OF CONFESSION:

A confession must be voluntary to be admissible. The true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort. The question in each case is whether a defendant's will was overborne at the time he confessed. *State vs. Hartley* (SD 1982) 326 N.W.2d 226. A statement is voluntary if it is a product of a defendant's free and rational choice. *Muncey vs. Arizona* (1978) 57 Law Ed.2d 290; *State vs. Janis* (SD 1984) 354 N.W.2d 916.

> "In determining whether a defendant's will was overborne in a particular case the court has assessed the totality of all the surrounding circumstances . . . both the characteristics of the accused and the detail of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, has low intelligence, the lack of any advice of the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the

> use of physical punishment such as the deprivation of food or sleep. In all of these cases, the courts determine the factual circumstances surrounding the confession, assess the psychological impact on the accused, and have evaluated the legal significance and how the accused reacted. See *Schneckloth vs. Bustamonte* (1983) 36 Law Ed.2d 854; *State vs. Hartley*, supra.

Coercion can be psychological as well as physical. *Blackburn vs. Alabama* (1960) 4 Law Ed.2d 242. However, if present, it does not per se make a confession involuntary. *Martin vs. Wainwright*, 770 Fed. 2d 918 (11th Circuit 1985.) Moreover, it is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. *Miller vs. Fenton* 796 Fed. 2d 598 (3rd Circuit 1986.) No one factor is determinative but rather the court must consider the effect that the totality of the circumstances had upon the will of the Defendant. I have read *State vs. Faller* (SD 1975) 227 N.W.2d 433, wherein the Supreme Court stated that a failure to advise a Defendant of his Miranda warnings before and in connection with the lie detector examination made his confession involuntary and inadmissible. However, certain later cases seem to dilute the holding in *Faller*, to wit:

1. *Faller* pre-dated *Oregon vs. Mathison* (1977) 50 Law Ed.2d 714, and the law which has developed since on the question of custodial interrogation.

2. The defendant in *Faller* was not told he did not have to take the test or that the test result would be inadmissible in court. Our Supreme Court has *since* determined certain statements to be voluntary made after a polygraph examination where the defendant

was twice advised that he did not have to take the test if he chose not to. *State vs. Dubois* (SD 1979) 286 N.W.2d 801.

3. Our Supreme Court has since held certain statements made during and subsequent to a lie detector test to be voluntary when the defendant has signed a consent form prior to the taking of the test and his counsel approved the suggestion that the defendant take the test. *State vs. Adkins* (SD 1975) 225 N.W.2d 598.

4. Our Supreme Court has since stated that a court must consider the totality of the circumstances and that the polygraph examination and the facts surround it is simply one of the factors. *State vs. Caffrey* (SD 1983) 332 N.W.2d 269.

In the *Caffrey* case a juvenile during questioning was threatened with forcibly taking a polygraph exam. He was not advised that he could not be compelled to take the test nor that any results would be inadmissible in court. The Supreme Court again discusses polygraph tests and accepted the following language from *United States vs. Little Bear*, 583 Fed 2d 411 (8th Circuit 1978):

> "As part of the effort to remove or mitigate the pressures toward self-incrimination generated by a polygraph situation, we deem it essential that a person subject to a Polygraph examination be appraised, at a minimum, of the rights to refuse to take the test, to discontinue it at any point, and to decline to answer any individual questions."

Based on the above, I feel that the failure to give the Miranda warnings prior to the polygraph test is simply

one of the factors a court must consider in determining whether a defendant's statements were voluntary. It is not per se determinative. Also see 89 ALR 3d 230.

DISCUSSION OF FACTS:

1. Concerning the polygraph examination the evidence shows the Defendant was advised she did not have to talk to law enforcement; she was advised by Lindberg and DeVaney that she did not have to take the polygraph examination; she was advised that the test could not be used in court; she was advised that the test was an investigatory tool and that the results could implicate her or eliminate her as a suspect; she signed a consent form to take the test and authorized the results to be released to Lindberg; there was no evidence that her mental or physical condition, *at the time she took the test,* was abnormal in any way; she had the test fully explained to her and went through a preliminary testing with the use of cards; she voluntarily cooperated in everyway. Further, it seems reasonable that when a person is advised that she does not have to take a polygraph test and is also advised that she does not have to speak with law enforcement at all, this would satisfy the minimum requirements adopted by our Supreme Court in *State vs. Caffrey* (SD 1983) 332 N.W.2d 269. I have had the opportunity to listen to the evidence, view the witnesses, determine their credibility and give weight to their testimony. I cannot overlook the fact that the Defendant is an intelligent and educated adult who understood completely the statements and admonitions given to her prior to the testing in question.

2. Concerning the characteristics of the accused, the Defendant did not sleep much prior to the exam; she had not eaten that day; she is 31 years of age; intelligent; educated; and employed. She was not deprived of food or sleep. She could have asked for food and could have left at any time. I do not feel that the lack of sleep or food affected the Defendant to such an extent that it would make her statements involuntary.

3. Concerning the details of the interrogation, there were times when the Defendant was highly emotional; times when she was calm and collected; times when there were no responses and long pauses. The interrogation lasted from around 3:30 p.m. to between 9:30 and 10:00 p.m. that evening. Separate people, taking turns, questioned the Defendant and there were times when the interrogator would yell at the Defendant. Different interrogation techniques were used such as false hypothetical questions and "religion." There were times when the Defendant was left alone in the interrogation room. The Defendant had never been previously interviewed by law enforcement. She was never informed of her Miranda rights. The interrogation was terminated because the interrogator thought the Defendant was going to have a nervous breakdown. On the other hand, when Duane Majeres, psychologist, arrived he made an initial examination and spoke with the Defendant. He testified that the Defendant was calm and collected and not emotionally upset. Further that the prior interrogation had minimal effect on her. The Defendant was allowed to leave the room whenever she wanted; she was not deprived of food or sleep; she was purchased a diet coke; and she was free to leave at any time.

The one common thread throughout this whole proceeding which was glaringly evident to this court was the total voluntary cooperation by the Defendant. She voluntarily came to the police station, accompanied by her family and friends; she voluntarily took the polygraph test and continually answered questions knowing she did not have to do so; she voluntarily provided physical evidence; she voluntarily signed consent forms; and she knew her husband had signed search consent forms. In short, the Defendant did not have to come down to the station, did not have to take any tests, did not have to answer any questions, and could leave at any time she wanted, and was well aware of her rights in this regard. The Defendant simply and unequivocally voluntarily cooperated with law enforcement.

Psychological tactics are not entirely forbidden and emotionalism does not invalidate a confession. *Miller vs. Fenton*, supra. The Defendant was emotional but the investigation of the killing of her 3½ year old daughter is an emotional subject for everyone concerned. I am satisfied that neither the emotional state of the Defendant nor the details of the interrogation effected the voluntariness of her statements.

I have considered the totality of the circumstances and their affect upon the will of the Defendant and I determined that, at all times relevant herein, the statements made by the Defendant were voluntary. The will of the defendant was not overborne. I am convinced of this beyond a reasonable doubt. I have had the opportunity to listen to the Defendant and observe her while testifying, as well as having full opportunity to give weight to all of

the testimony given, and I am satisfied that the Defendant is an intelligent, educated and most capable adult.

II. CUSTODIAL INTERROGATION

The leading case is *Oregon vs. Mathison*. 50 Law Ed.2d 714 (1977) wherein the court stated:

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause a suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there was [sic] been such a restriction upon a persons freedom as to render him "in custody". It is that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited."

It is not whether a particular investigation has "focused" on a person but rather the "custodial" aspects of the interview. *Beckwith vs. U.S.*, 48 Law Ed.2d 1 (1976.)

South Dakota is in accord:

> The proper test in determining whether a person need be given the Miranda warning is not whether the investigation is focused on an particular suspect, but rather, whether the person being questioned is in custody or deprived of

his or her freedom to leave. *State vs. Bruske* (SD 1980) 288 N.W.2d 319.

The mere fact that an interrogation takes place at a police station does not mean that the interrogation becomes "custodial." *State vs. McQuillen* (SD 1984) 345 N.W.2d 867; *State vs. Dubois* (SD 1979) 286 N.W.2d 801.

The facts of this case are adequately set out earlier in this opinion, however, it should also be noted that on April 9, 1987 the Defendant and her husband advised the police that they had attained the services of an attorney. Prior to that time the Defendant never advised or informed law enforcement that she did not want to answer any of the questions; she never told them that she wanted an attorney; and she never gave any indication in any other matter that she did not wish to cooperate with the investigation.

I am satisfied beyond a reasonable doubt that the interrogation was non-custodial in nature and therefore the Defendant need not have been read her Miranda rights. The facts surrounding the interview of April 7 firmly establish that there was no indications of arrest or restraint on freedom of movement. There is simply no evidence to show that the Defendant was not free to leave at any time. Even she testified to this. Defendant did testify that she felt she couldn't leave because of the investigatory process of law enforcement, however, I have already determined this to be unbelievable and have rejected this testimony.

CONCLUSION

In conclusion I state that deciding suppression motions are a grave responsibility since the Court's function is not discretionary but rather fact finding. The nature of this case enhances this responsibility. South Dakota Criminal Pattern Jury Instructions 1-16-2 provides:

> In judging the credibility of the witnesses and determining the weight to be given their testimony, you may and should consider the opportunity and capacity of the several witnesses for seeing and knowing and remembering the matters about which they have testified; their conduct and demeanor while testifying; their apparent candor, fairness, biased or prejudiced, if any appears; their interest or lack of interest in the result of the case; the motive, if any, actuating them as witnesses; the reasonableness of their statements; and all the evidence, facts and circumstances shown tending to shed light upon the truth or falsity of the testimony of any witness in the case and the weight to be given his testimony.

Also, when serving in said capacity the judge is allowed to ferret out the evidence which he believes is good or the evidence which he believes to be unworthy, and has the right to consider his ordinary experiences and observations in daily affairs of life. *Gross vs. Conn. Muth Life Insurance Company* (SD 1985) 361 N.W.2d 259.

I feel I have made this decision with the utmost consideration for both parties and have made this decision not as the result of reading from a transcript but rather from being there.

The State may prepare the proper Findings, Conclusions and Order.

BY THE COURT:

/s/ Eugene L. Martin
Eugene L. Martin
Circuit Court Judge
Third Judicial Circuit

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA	)	
	:	ss
COUNTY OF BEADLE	)	
STATE OF SOUTH DAKOTA, Plaintiff,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE: SUPPRESSION MOTION
v.	)	
DEBRA SUE JENNER, Defendant.	)	(Filed Mar 16, 1988)

The Defendant by way of motion has moved to suppress any and all statements made by the Defendant during the course of an interview conducted by law enforcement officers on April 7, 1987. Defendant's motion alleges two grounds for suppression. Those are:

> That the statements were not freely and voluntarily given by the Defendant, thus violating her rights under the fifth and fourteenth amendments to the United States Constitution; and
>
> That the interrogation was custodial in nature and therefore the Defendant should have been advised of her rights under the *Miranda* decision.

The State has conceded at the time of the interview the Defendant was not given Miranda warnings, but asserts that the interrogation was not custodial and therefore no warnings were required. The State has also

asserted that the statements given on April 7 were voluntary.

A suppression hearing was held upon Defendant's motion on January 6, 1988. Following the hearing, both parties submitted legal briefs to the Court. On January 29, 1988, the Court issued its Memorandum Decision on the motion. The Court now sets forth its Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

I

The death of Defendant's daughter, Abby Lynn Jenner, occurred on or about April 4 or 5, 1987.

II

On the morning of April 5, 1987, Beadle County Sheriff Tom Beerman spoke with the Defendant and her husband, Lynn Jenner, at the Huron Regional Medical Center. Defendant's husband did most of the talking. Sheriff Beerman spoke with them about ten minutes and said he would get back to them.

III

Around 2:30 p.m. on the afternoon of April 5 Deputy Sheriff Jim Sheridan obtained a written consent from Lynn Jenner to search the Jenner residence and also one of the Jenner vehicles.

IV

Later on April 5 Jerry Lindberg, Division of Criminal Investigation (DCI) agent, called Sheriff Beerman to see if the Jenners would talk with him. Sheriff Beerman then called the Jenners and talked with Lynn Jenner and advised him that Mr. Lindberg would like to speak with them. Sheriff Beerman also advised that Lindberg was a DCI agent. Both the Defendant and her husband agreed to come to the police station to speak with Lindberg. Between 9:00 and 9:30 that evening, the Defendant and her husband came to the police station voluntarily and on their own. Lindberg interviewed both Defendant and her husband separately. The interviews lasted a total of forty-five minutes to one hour. Both the Defendant and her husband were very cooperative.

V

After the interviews, the Jenners went to their residence and provided law enforcement with the clothing they had been wearing on the evening of April 4. They also provided hair samples. On this date Lindberg had also interviewed other people besides the Defendant and her husband.

VI

On April 6, 1987, at about 8:12 a.m. the Defendant called Sheriff Beerman at his office. Later that morning Beerman returned the call to the Defendant at the residence of Lynn Jenner's father. Defendant stated, "You probably won't believe this but my ring has not been

washed or scrubbed and that the investigators could have it." Later the Defendant had the ring delivered to Captain McQuillen of the Huron Police Department. On this day the Defendant's husband also turned over some jewelry to law enforcement.

VII

On April 7, 1987, Sheriff Beerman called Lynn Jenner and asked that he and his wife come to the sheriff's office. The Jenners agreed and came to the sheriff's office on their own. Accompanying the Jenners were Lynn Jenner's parents as well as Reverend Darrell Wagner of the Wesleyan Church. Both the Defendant and Lynn Jenner were given polygraph tests separately and alone.

Prior to the test being given, Lindberg spoke with both the Defendant and her husband. They were advised as follows:

(A) They did not have to talk with him if they did not want.

(B) They did not have to take the polygraph test if they did not want.

(C) The test was being used as an investigator's tool and that the results could implicate or eliminate them as suspects.

(D) If they did not pass the test, they would be asked more questions.

(E) Defendant admitted during her testimony that she was told that the test could not be used in court.

VIII

The Defendant asked Lindberg if the test would be accurate considering her emotional state. Lindberg told her that the emotional state she was in would have no bearing on the testing. Both the Defendant and her husband agreed to take the test. Further, the Defendant signed a consent form to take the polygraph examination. The consent form provides basically that the Defendant voluntarily agrees to take the examination; that no threats or promises have been made or duress or coercion exerted to induce her to take the examination; that the technique will be fully explained to her and that all questions will be reviewed with her prior to the examination; and that she authorizes the release of the results of the exam, and any recordings, statements, or conversations regarding the interview to Jerry Lindberg, DCI.

IX

DCI Agent Fred Devaney, polygraph examiner, met with the Defendant and explained the polygraph examination to her. Devaney also advised the Defendant that she did not have to take the polygraph test, that all the questions would be reviewed with her, and that the results would be released to Lindberg. The Defendant agreed to take the test. A pre-test was conducted using cards as the testing tool. The test started around 2:15 p.m. and lasted until around 3:30 p.m.

X

The examination-interrogation room was twelve foot by fourteen foot; had one table and three or four chairs; a filing cabinet; no windows to the outside; a one-way glass window; no clock; no taping equipment or radio. The door was shut during the polygraph examination and then during the subsequent questioning was slightly open between three to five inches. The room was "bugged" with a listening device that allowed conversation to be heard by other agents, but not recorded.

XI

After the polygraph test Devaney left the room for approximately fifteen minutes. The Defendant was left alone in the room. Devaney came back into the room after reviewing the charts and told the Defendant she had lied. He confronted her with having been responsible for the death of her daughter. The Defendant became very emotional stating she didn't do it, she couldn't have done it. Later, Lindberg came into the room and talked with the Defendant for approximately twenty minutes discussing the accuracy of the polygraph examination. Lindberg told the Defendant she had failed the test and accused the Defendant of killing her daughter. Devaney then returned and talked with Defendant until about 5:00 p.m. Devaney again told Defendant that he felt she was responsible for the death of her daughter. He stated that Stewart (Defendant's son) had said that the Defendant had spanked Abby (victim) on the night of the incident. Devaney also told the Defendant that *if* the Defendant's hair was found in Abby's hands, this would not be good. He further

advised Defendant that there was a rational Debbie and an irrational Debbie; that the irrational Debbie did the deed and that he wanted the truth about the irrational Debbie. Defendant stated, "The only way I could have done it is if I psyched out."

XII

During this period of questioning Devaney on one occasion left the room and upon returning, found the Defendant had gone to the bathroom and had then returned to the interrogation room. Devaney asked the Defendant if she wanted a Coke and the Defendant requested a Diet Coke and Devaney got her one. During the interviews with Devaney, Defendant's mood would swing to the extremes. There were times when she would cry; times when she would be calm and collected. At one point, the Defendant wanted to know if Devaney was a psychologist and if she could be hypnotized to see if she could remember what happened.

XIII

Around 5:00 p.m. Devaney asked Agent Ken Giegling to take over because he wasn't being successful. Devaney introduced Giegling to the Defendant and the Defendant agreed to talk with Giegling. Giegling had sat in the outer office listening (phone set) to the interviewing and was making notes. Devaney and Giegling had worked together as an interviewing team for several years.

XIV

During this interview the Defendant stated she was going to tell Giegling something she had never told anyone before and that was when they came home Lynn had closed the drapes and the door. Giegling told the Defendant that he knew she was responsible for the death of her daughter; that there was a good Debbie and a bad Debbie; that there is more there and "I am going to get it out of you." Also, he would preface some questions with the fact that the Defendant was a good mother and Christian and then go on to ask the question. At one point, Defendant stated, "Why are you putting me through this. It's bad enough to lose a daughter." Giegling stated that he was doing his job. There were times when Giegling would yell at the Defendant. Giegling told the Defendant that she was not being truthful and that she knew more than she was telling. During the interview, Defendant stated, "Could I have done this and not know it? Could I have psyched out?" Defendant further stated that she also would like to find out and suggested hypnotism, truth serum, or to see a psychiatrist. After further questioning, the Defendant stated, "I may have psyched out during the night." During the interview, Defendant's mood would fluctuate from calm to excitement to anxiety and distress. At times she was highly distraught and at other times she would blank everything out and show no emotion whatsoever. At one point she held Giegling's hand and even laid her head on his lap and cried.

XV

During the interview with Giegling, the Defendant made statements on four separate occasions wherein she

perceived the incident through the eyes of another. On the first occasion she volunteered a statement about seeing the incident through the eyes of her daughter. Defendant stated, "Abby knew the person and was not afraid. Abby saw a knife." When asked to describe the knife, the Defendant held her hands apart about eight inches and said the handle was wooden and it was Chicago Cutlery. At this time the Defendant was staring at the ceiling, her eyes were glassy and she spoke with a different voice. On the second occasion, the Defendant again started speaking of seeing the incident through the eyes of her daughter and Giegling asked, "Is that person leaning over your daughter, you?" Defendant stated, "I think so." On a third occasion the Defendant stated, "Abby saw a black object." Defendant further stated there was a black airplane belonging to her son, Stewart. The airplane was in the kitchen area. At this point Deputy Jim Sheridan obtained a consent to search from Lynn Jenner and the officers went out to the residence and found the airplane where the Defendant had indicated it would be. On the fourth occasion the Defendant perceived those events as being seen from the corner of the room and stated she saw a person with a knife.

XVI

The statements made by Defendant on the four occasions referred to in Finding XV were volunteered by the Defendant and not made pursuant to any questions asked her by anyone.

XVII

Giegling ended the interview sometime between 9:30 and 10:00 p.m. because he felt the Defendant was going to have a nervous breakdown. Duane Majeres, local psychologist, was called immediately and arrived sometime between 9:30 and 10:00 p.m.

XVIII

When the Defendant and her husband were reunited, the Defendant stated, "I did it, I did it." She then said to her husband, "Did you help me?" Her husband stated he did not help her.

XVIX

Duane Majeres, psychologist from Community Counseling in Huron, was called and arrived between 9:30 and 10:00 p.m. Upon entering the Correctional Facility he heard a wailing sound. He was introduced to the Defendant and after speaking with her determined she was not suffering from psychosis and had no suicidal propensities. The Defendant was clearly responding. Further, the Defendant's previous interviews had minimal effect on her and she was very much under control.

XX

The Defendant, Debra Sue Jenner, is thirty-one years of age. She is an agri-research technician and has an associate college degree.

XXI

The Defendant was aware that she did not have to take the polygraph test; that she did not have to speak to anyone; that the polygraph test results could not be used in court.

XXII

The Defendant was never threatened or restrained in any way.

XXIII

The Defendant never told anyone that she did not want to take the polygraph. The Defendant never asked that questioning stop. The Defendant never requested the presence of an attorney. The Defendant never requested to leave at any time.

XXIV

The Defendant voluntarily took the polygraph test; voluntarily went to the Corrections Center; voluntarily answered questions; voluntarily provided hair samples, clothes and jewelry and was aware that her husband had consented to several searches.

XXV

Up to and including April 7, 1987, Lynn and Deb Jenner cooperated fully with law enforcement officers by giving interviews, consenting to searches, consenting to

polygraph tests, and turning over various items of evidence.

XXVI

At no time were any threats or any form of physical violence exerted towards Deb or Lynn Jenner.

XXVII

At no time relevant herein was either Defendant or Lynn Jenner ever advised of their Miranda rights. Further, neither the Defendant nor her husband ever requested the services of an attorney; never requested that the questioning stop; and never refused to answer any question.

XXVIII

The Defendant was indicted by a grand jury and arrested on August 28, 1987, which was the first time the Defendant was physically taken into custody.

CONCLUSIONS OF LAW

I

This Court has jurisdiction over the parties and the subject matter herein.

II

In the event any of these Findings of Fact or Conclusions of Law are improperly designated, they are to be considered interchangeable.

III

The totality of the circumstances establishes beyond a reasonable doubt that the Defendant's statements on April 7, 1987, were freely and voluntarily given and were not the result of compulsion or inducement of any sort.

IV

The totality of the circumstances establishes beyond a reasonable doubt that Defendant's will was not overborne at the time of her statements on April 5, 1987.

V

The totality of the circumstances establishes beyond a reasonable doubt that Defendant's statements on April 7, 1987, were the product of free and rational choice.

VI

The evidence establishes beyond a reasonable doubt that the Defendant was not in "custody" when she was interviewed on April 7, 1987.

VII

During the interview on April 7, 1987, there were no indications of arrest or restraint of the Defendant's movement. The Defendant was able to leave at any time.

VIII

The evidence establishes beyond a reasonable doubt that the interview of the Defendant on April 7, 1987, was

not a "custodial interrogation" and therefore officers were not required to give the Defendant Miranda warnings.

IX

The Court hereby incorporates its Memorandum Opinion of January 29, 1988, as additional Findings of Fact and Conclusions of Law.

ORDER

Based upon these Findings of Fact and Conclusions of Law and the Court's Memorandum Opinion, the Defendant's motion to suppress is hereby denied.

Dated this 16 day of March, 1988, at Huron, South Dakota.

BY THE COURT:

/s/ Eugene L. Martin
Honorable Eugene L. Martin
Circuit Court Judge

ATTEST:

/s/ Adrianne Schinderling
Adrianne Schinderling
Clerk of Courts

By: _____
Deputy Clerk

SEAL

STATE of South Dakota, Plaintiff and Appellee/Cross-Appellant,

v.

Debra Sue JENNER, Defendant and Appellant/Cross-Appellee.

Nos. 16211, 16240.

Supreme Court of South Dakota.

Argued March 20, 1989.

Decided Feb. 14, 1990.

Rehearing Denied March 26, 1990.

David R. Gienapp of Arneson, Issenhuth & Gienapp, Madison, for defendant and appellant/cross-appellee, William E. Matheson, Sioux Falls, on the brief.

John W. Bastian, Asst. Atty. Gen., Pierre, for plaintiff and appellee/cross-appellant, Roger A. Tellinghuisen, Atty. Gen., on the brief.

HENDERSON, Justice (on reassignment).

PROCEDURAL HISTORY/ISSUES

This criminal case arose after the body of a three and a half year old girl, Abby Jenner (Abby) was discovered mutilated and stabbed to death in her bed on April 5, 1987. Evidence indicates she tried to ward off her attacker. The Beadle County Grand Jury issued an indictment charging Abby's mother, Debra Sue Jenner (Debra), with one count of second degree murder (SDCL 22-16-7) and one count of first degree manslaughter (SDCL 22-16-15(3)). After a trial in the Circuit Court for Beadle County, the jury found Debra guilty of second degree murder. She was sentenced to life imprisonment. Debra

appeals her conviction (Notice of Appeal 16211) denoting eight separate issues which we observe are allegations that the trial court erred in essentially four regards:

I. Debra's motion to suppress her statements made during police questioning, on April 7, 1987, should have been granted;

II. The jury was not correctly instructed regarding unconsciousness, amnesia, and insanity;

III. A state-requested motion in limine regarding third party perpetrator evidence was improperly granted; and,

IV. Evidence was insufficient to support her conviction.

–Holding–

We affirm Appellant's conviction, rejecting her arguments. We do not reach the issues raised by the State's notice of review (16240), wherein the State urges that second degree murder and first degree manslaughter are not alternative counts, as the trial court instructed the jury. We therefore uphold the jury's verdict.

FACTS

Appellant is the wife of Lynn Jenner, (Lynn) and the mother of a daughter, Abby, born November 10, 1983, and a son, Stuart, born July 27, 1982. Abby had an allergy to milk products, and had difficulty sleeping at times. During the evening of April 3, 1987, Abby awoke in the night, requiring the attention of her parents. During a trip on April 4, 1987, she soiled her pants twice. Shortly before

9:00 a.m. on Sunday, April 5, 1987, Lynn entered Abby's bedroom to awaken her. He found her in bed, lying totally still, with her mouth full of blood. He screamed, whereupon Debra came over from the master bedroom, approximately twenty feet away. Debra sat on the edge of Abby's bed and touched her. Abby's body was cold, her eyes dilated. Debra telephoned "911" at 8:59 a.m., gave her address, then relating that a three year old girl was there, with blood and "organs" coming out of her mouth. Debra's tone of voice, during this conversation, was very loud. An ambulance was dispatched.

Before the ambulance arrived, at 9:05 a.m., Debra made an additional telephone call to Doctor Cynthia Kortum, M.D., her family doctor, during which her tone of voice was quite calm. She informed Dr. Kortum, matter of factly, that Abby had died during the night and requested an autopsy. Debra, in the six minutes between her 911 call and the ambulance's arrival, also telephoned her parents, Bruce Schafer and Janet Schafer, and her pastor, Darrel Wagner. At the time the ambulance arrived, she was engaged in still another call, to her friends, the Brink family. The ambulance, her parents, and officer William Ehlers, of the Huron Police Department, arrived at the Jenner home within moments of each other. An emergency medical technician entered the Jenner home, found no signs of life in Abby, and carried her, still enwrapped in bloodstained bedding, out to the ambulance. The ambulance then proceeded to the Huron Regional Medical Center.

The ambulance crew noticed numerous cuts on Abby's body. Later examination revealed that *seventy* stab wounds were inflicted on Abby. Dr. Brad Randall, the

forensic pathologist who performed Abby's autopsy, testified at trial that some wounds were of a slashing type, consistent with a blade sharpened on one edge and dull on the other. Other wounds were punctures, which could have been made by a model airplane owned by Stuart which was found next to the sink in the Jenners' kitchen. In particular, the geometry of one wound was described by Dr. Randall as "relatively unique", matching the model plane, as markings around the wound corresponded to a protrusion on the back of the plane and its rear fins. Dr. Randall characterized numerous cuts on Abby's arms and hands as "defensive" in nature, i.e., inflicted as Abby, who laid on her stomach, attempted to fend off the blows. He termed the attack a "frenzy type", evidenced by repeated blows with no particular target. He estimated that Abby died during the early morning hours of April 5, 1987.

No members of the Jenner family accompanied Abby to the hospital. At 9:17 a.m., six minutes after delivering Abby to the hospital, the ambulance driver, Mike Ball, returned to the Jenner home to retrieve equipment. Ball testified that appellant was talking on the telephone normally, in an utterly calm manner. Debra and Lynn went to the hospital only after Janis LaMont, a registered nurse, called them at home requesting information. Once at the hospital, according to LaMont, Debra appeared restless, and paced in the hallway. Lynn stayed in the waiting room, head in hands. Shirley Jenner, Debra's mother-in-law, remarked that she wished Debra would cry. David Bender, a hospital maintenance worker, spoke to Shirley, who was, herself, a hospital worker, for about 20 minutes. At one point, Shirley Jenner left him to converse with

Debra. He testified that he heard Debra remark that it was a "screwed-up day", and asked "why couldn't this have been a simple death?" He also heard Debra remark, "I don't know how the hell it happened", in reference to the cuts, wounds and scratches upon Abby's lifeless body. At one point, Debra asked Shirley who Bender was. When Shirley identified him as a hospital maintenance worker, Debra responded: "Oh shit."

While at the hospital, Beadle County Sheriff Tom Beerman (Beerman) spoke to Debra and Lynn. According to Beerman's testimony at trial, he asked Debra if Abby had been sick, and Debra replied that Abby had been "hyper" for a couple of days, that she had stayed up with Abby on Friday night (April 3, 1987), and that Abby had soiled her pants a couple of times on Saturday afternoon. Debra also related that she checked on Abby at midnight Saturday night, when Abby was asleep, and did not see her again until after Lynn found her the next morning. Debra and Lynn, Beerman was told, then went to bed, only to be disturbed by noise from a party next door. They arose, looked out a window, and watched three intoxicated individuals enter a car and drive away. Per Debra, they then returned to bed and slept until the next morning. Lynn, who discovered Abby's body, informed Beerman that he went into Abby' room to waken her for church, noticed something wrong, turned her over onto her back, and saw blood. He looked in Abby's eyes and knew that she was dead.

Meanwhile, when the Jenners, mother and father of the victim, were at the hospital, Deputy Chief Robert McQuillen (McQuillen) and Sergeant William Ehlers (Ehlers) of the Huron Police Department went to their

home. There they found Lynn's father, Merlin Jenner, and Ruby Wagner, wife of the Jenners' pastor. Examining Abby's bedroom, they immediately noticed that her bedding had been replaced. After Mrs. Wagner told him she had already cleaned the room, as she did not want the Jenners to come home and see the mess, McQuillen told those present to leave the room and house alone. McQuillen and Ehlers briefly went to the hospital, and then returned to the Jenner home. They noticed that the bedding in Abby's room had been changed again. McQuillen told everyone to leave. The bedding, not taken to the hospital with Abby, was recovered that morning from defendant's father, Merlin Jenner, who had placed it in his car.

Huron police detective Dave Rand, Dr. Ilya Zeldes, a forensic scientist, and Rex Riis, a criminologist from the State Forensic Laboratory in Pierre, examined the Jenner home later that day. They found no evidence of forced entry. Bloodstains were discovered on the headboard of Abby's bed, on the wall behind the bed, on the bathroom floor, on a wall-mounted light switch in Abby's room and on a telephone near the kitchen. Abby's blood was therefore found in different parts of the Jenner home. Abby's mattress was turned over before they arrived, with the bloody side facing down. A knife which was consistent with some of Abby's slashing wounds was in a silverware tray atop a microwave oven near the kitchen sink. These officers removed clothing, similar to clothes Debra claimed to have worn to bed on the night Abby was slain, from a hamper next to a washing machine in the basement. No identifiable fingerprints were found.

Debra and Lynn went to Merlin's house after they left the hospital that day. While there, Mary Brink, a family friend, noticed that Debra washed her hands several times that morning. When asked what the problem was, appellant responded: *"I can't get the smell off of my hands."* Debra and Lynn eventually left Merlin's for Debra's parent's home, where Beerman reached them by telephone, sometime after 5:00 p.m. Beerman asked them to come down to his office to be interviewed by Jerry Lindberg (Lindberg), a Division of Criminal Investigation (DCI) agent.

Debra was interviewed by Lindberg for approximately an hour and a half, starting at 8:30 p.m. During this interview, she repeated much of the factual background she had earlier given to Beerman. There was one significant difference, however, as she told Lindberg that she did enter Abby's room that morning just before Lynn discovered Abby's body, but noticed nothing unusual. Also, according to Lindberg's trial testimony, Debra claimed that she could not remember whether the outside doors of her home were locked the night Abby died. Lindberg observed that Debra was very calm and collected during the interview. After the Jenners left, Beerman, Riis, and Dr. Zeldes went to the Jenner's home, where hair and blood samples were given by the Jenners, by consent.

The next day, April 6, 1987, Debra offered to turn over her class ring, which she thrice assured him had not been "scrubbed". As she later testified that she wore it from Saturday night, April 4, through Sunday night, April 5, the ring, per her statements, must have been washed at least four times while she wore it (three times

while at Merlin's house, according to Kay Brink's testimony, and once, additionally, in the bathtub at her home after Lynn discovered Abby's body). During this conversation, she asked Beerman why the police were not checking persons who had been at the party next door. Beerman replied that they were being investigated. Lynn, later that day, turned the ring over to McQuillen and Rand, together with other personal jewelry.

Beerman telephoned Lynn Jenner, on Tuesday, April 7, 1987, and asked that he and Debra come to his office for a few more questions. They agreed and arrived shortly after 2:00 p.m., accompanied by Lynn's parents and their Pastor, Darrell Wagner. DCI agent Lindberg spoke to them together, for five to ten minutes, and asked them to submit to a polygraph test. Lindberg explained that the tests were strictly voluntary, and that the polygraph was used as an investigative tool to help eliminate or generate suspects. Lynn readily consented to testing, and Debra consented after being assured that her grief would not affect the test results. The Jenners were then separated, and DCI agent Fred DeVaney (DeVaney) presented a polygraph consent form to Debra for signature. As she read the form, he advised her that she did not have to take the test, and discussed the test procedure. She signed the consent form. DeVaney then administered the polygraph test, which lasted 90 minutes. During the test, Debra showed no reluctance or hesitation to answer questions. According to DeVaney's trial testimony, Debra theorized that two men had broken into the house and killed Abby. She opined that it had to be two men – one to kill, and one to open doors without getting blood on

the doorknobs. Between 3:30 and 4:00 p.m., having finished the test, DeVaney left Debra alone in the room for five to ten minutes, while he reviewed the polygraph charts. The charts indicated that she had been deceptive in her responses. DeVaney asked Lindberg to follow this up.

Lindberg then talked with Debra for 15 to 20 minutes. During this interview, Debra admitted past problems with physical discipline upon the deceased child, including one specific incident where she spanked Abby with a wooden spoon so hard that the spoon broke. She also stated that she and Lynn locked their bedroom door at night to prevent their children from crawling into bed with them. When asked if she hurt Abby, she replied: "I don't remember[,]" and "I didn't do this, but I could have psyched out during the night." When asked, outright, if she killed Abby, she simply denied remembering it. At one point, according to Lindberg's trial testimony, she said: "A person could just go click and go in and do this and clean up the mess and not remember it." She denied noticing any smell of blood, even after touching Abby after Lynn found her dead, and related that she noticed nothing unusual when she entered Abby's room immediately before that (at trial, Debra testified that she only glanced at Abby, and focused entirely on the floor when passing around the bed on the way to the closet). During this discussion, Debra's demeanor fluctuated between being calm and visibly upset with great rapidity.

At 4:00 p.m., DeVaney replaced Lindberg and interviewed Debra for another hour. She exhibited no reluctance or hesitancy to continue the interview. According to DeVaney, Debra repeated that she might have "psyched

out" and done it, and asked if he was a psychologist (he was not). She also volunteered to him that she wanted to use any means in DeVaney's words, "to get the truth out of her if she had done it[,]" including the use of a psychologist or hypnosis. DeVaney testified that he left the room at one time, and came back to find that she had gone to the bathroom and returned while he was out. He also procured a Diet Code for her, after she declined an offered Coca-Cola. At approximately 5:00 p.m., he discontinued his questioning because he perceived that she was looking down on him after he responded negatively to her inquiry as to whether he was a born-again Christian. He asked her if she was willing to continue the interview with another DCI agent, Ken Giegling (Giegling). She agreed.

During this interview, which lasted until 9:00 p.m., Debra told Giegling that neither her husband nor her son killed Abby. As in the earlier interviews that day, she indicated that she could not recall killing Abby, yet repeated that she might have "psyched out." According to Giegling, Debra asked his help in spurring her memory, and offered to undergo hypnosis, take a "truth serum", or talk to a psychologist to that end. Debra related that, in Giegling's words, "from the start of all this that she has had it in the back of her mind that she could have done this." She also informed him that she was afraid she had committed "this horrible premeditated act[.]" At another point, Giegling testified, she grabbed his hand and told him that she recalled her husband locking the front door of her home on the night in question, a fact that she had told nobody else (she claimed at a later suppression hearing, and at trial, that

she could not remember if this memory concerned the night Abby died).

DeVaney also testified that Debra described the killing several times, as seen through Abby's eyes. The first such account came, according to Giegling, without any prompting: Abby was not afraid, knew the perpetrator, trusted the person, and saw a knife, a Chicago Cutlery knife which she had seen before. The second time Debra reconstructed Abby's point of view, she indicated that her own hair was down, and Abby grabbed it. (Analysis of hair samples taken from Abby's hands and arms indicated that these hairs were consistent with samples of either Abby's or Debra's hair, but not Lynn's). Debra related that a black object was in Abby's room at the time, and identified it as a black model airplane which belonged to her son. When asked where the plane was then, Debra informed Giegling that it was on the counter in her kitchen. Giegling then left Debra and informed the police of the model airplane and its location. They found it exactly where Debra said it would be (this is the model plane, the shape corresponding to wounds on Abby's body). Up until that point, the police had been unaware of the model plane. At the suppression hearing and trial, Debra disputed Giegling's account. She testified that Giegling had simply asked if there were any sharp toys in the house, to which she replied by identifying the model and giving its location.

The last time Debra described events in Abby's bedroom for Giegling, she changed her position, stating that a man was standing over Abby's bed with a knife in his hand; further, that he took the knife with him when he left.

At approximately 9:00 p.m., Giegling became concerned with Debra's demeanor, which had been changing throughout the interview. He brought Lynn into the room, and Debra, as Giegling told it, cried out, "I did it, I did it, I did it[,]" which statement her husband then acknowledge by saying "You did it", (Debra and Lynn later disputed Giegling's account on this point, by testifying that she actually said "I did it, didn't I?"). Debra then asked Lynn if he helped her, to which he replied that he had not. She then said: "If you didn't help me how could I do this, clean up and go outside?" No further questioning was undertaken by the police that night.

At Giegling's request, Duane Majeres, a psychologist and counselor was called in to assess Debra's mental state after the police interviews. He found her to be well-oriented and very calm. After this psychological interview she left.

Before trial, Debra moved to suppress all of her statements elicited during the April 7 interviews on the grounds that she was subjected to custodial interrogation without being given *Miranda* warnings and that her statements were involuntary. At a suppression hearing on January 6, 1988, *Debra testified, inter alia, that she had no basis for feeling that she could not leave the police station.* Further, she testified that although she was offered no food during the interviews that day, she was not aware of even being hungry, as she was "concentrating on the other things." The trial court, after issuing detailed findings of fact and conclusions of law, denied the motion to suppress.

Debra's trial lasted from February 24, 1988, until March 15, 1988. The jurors' verdict determined her to be guilty of second degree murder, but not guilty of first degree manslaughter. The court instructed the jury that these were alternative counts.

DECISION

Debra's Notice of Appeal (16211)

I. *Suppression of Debra's Statements on April 7, 1987.*

Debra first asserts that the trial court erred in denying her motion to suppress testimony regarding incriminating statements she uttered during the interviews on April 7, 1987. Her argument is two-pronged: 1) The State failed to prove, beyond a reasonable doubt, that her statements were freely and voluntarily made; and, 2) The interviews were custodial in nature, undertaken without benefit of *Miranda* warnings. We reject both arguments.

Our standard of review regarding voluntariness of confessions or incriminating statements is well established. The State has the burden of proving beyond a reasonable doubt that such confessions or incriminating statements were freely and voluntarily made. *State v. Faehnrich,* 359 N.W.2d 895, 898 (S.D.1984); *State v. Janis,* 356 N.W.2d 916, 918 (S.D.1984). If the trial court finds the confession or incriminating statement was voluntary beyond a reasonable doubt, such finding is binding upon this Court unless we conclude from our review of the record that the finding is clearly erroneous. *State v. Albright,* 418 N.W.2d 292, 297 (S.D.1988); *Faehnrich,* at 898; *State v. Headrick,* 357 N.W.2d 268, 270 (S.D.1984). The trial

court must have reviewed the totality of the circumstances surrounding the interrogation. *Albright*, at 297; *Faehnrich*, at 898. *See also State v. Caffrey*, 332 N.W.2d 269 (S.D.1983); *State v. Lyons*, 269 N.W.2d 124 (S.D.1978). In reviewing the trial court's findings on voluntariness, we consider the evidence in the light most favorable to the finding. *State v. Volk*, 331 N.W.2d 67, 70 (S.D.1983). On this record, we do not deem the trial court's finding to be clearly erroneous. We are not unmindful of the plenary (de novo) review rule in the federal courts. Historically, we have not adopted this rule nor do we now. We do not perceive that the fifty sovereign states have been mandated to follow the plenary review rule. *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). We would not have reached a different result under that rule were it heretofore or now adopted. We have thoroughly reviewed the unique facts and conclude that the totality of the circumstances do not justify a conclusion of involuntariness.

Specifically, in response to Justice Morgan's dissent on the plenary (de novo) rule in this case, the stare decisis in this Court reveals that our standard of review regarding voluntariness of confessions is well established, as set out in the following cases in which current members of this Court participated, namely:

> *State v. Albright*, 418 N.W.2d 292 (S.D. 1988) (authored by Justice Miller, joined by Justices Morgan and Henderson, with Chief Justice Wuest concurring in result and Justice Sabers concurring on voluntariness but concurring in result because of a search warrant issue).

State v. Gregg, 405 N.W.2d 49 (S.D.1987) (authorized by Justice Sabers, on reassignment, joined by Chief Justice Wuest and Justice Henderson, with Justice Morgan concurring on the suppression issue, and former Chief Justice Fosheim dissenting on a different issue).

State v. Faehnrich, 359 N.W.2d 895 (S.D.1984) (a unanimous opinion authored by Justice Henderson, joined by then Chief Justice Fosheim, Justices Wollman and Morgan, and then Acting Justice Wuest).

State v. Headrick, 357 N.W.2d 268 (S.D.1984) (a unanimous opinion by then Acting Justice Wuest, joined by then Chief Justice Fosheim and Justices Wollman, Morgan and Henderson).

State v. Janis, 356 N.W.2d 916 (S.D.1984) (authored by then Chief Justice Fosheim, joined by Justices Morgan and Henderson, and Retired Justice Dunn, with Justice Wollman dissenting, on application of the facts to the clearly erroneous rule).

State v. Caffrey, 332 N.W.2d 269 (S.D.1983) (authored by Justice Wollman, joined by Justices Morgan and Henderson, with Justices Fosheim and Dunn concurring in result).

State v. Cowell, 288 N.W.2d 322 (S.D.1980) (a unanimous opinion authored by Justice Fosheim, joined by then Chief Justice Wollman and Justices Dunn, Morgan and Henderson).

State v. DuBois, 286 N.W.2d 801 (S.D.1979) (a unanimous opinion authored by Circuit Judge Dobberpuhl, sitting for Henderson, J., disqualified, joined by then Chief Justice Wollman, and Justices Dunn, Morgan and Fosheim).

State v. Lyons, 269 N.W.2d 124 (S.D.1978) (a unanimous opinion written by Circuit Judge Jones, sitting for disqualified Justice Zastrow, joined by then Chief Justice Wollman, and Justices Dunn, Porter and Morgan).

A finding by the trial court, that a confession or incriminating statement was beyond a reasonable doubt voluntarily made, is binding upon this Court, unless we conclude from our review of the record that the finding is clearly erroneous. *State v. Hall*, 353 N.W.2d 37 (S.D.1984), written for this Court by Justice Morgan.

The facts of this case, set out at length above, overwhelmingly indicate that Debra participated in the April 7 interviews of her own accord and cooperated fully. She and her husband, accompanied by his parents and the family pastor, came to the police station on their own volition. She was orally advised that the initial polygraph test was strictly voluntary, and that they were under no obligation to talk to the police. This oral warning was given twice, separately, by Agents Lindberg and DeVaney. *See, State v. DuBois*, 286 N.W.2d 801 (S.D.1979). Debra also signed a polygraph consent form before the test was administered, immediately after DeVaney advised her that she did not have to take the test and explained the process to her. *See, State v. Adkins*, 88 S.D. 571, 225 N.W.2d 598 (1975). The polygraph test was not used as a psychological threat, or figurative "rubber hose", in the manner proscribed in *State v. Caffrey*, 332 N.W.2d 269, 272 (S.D.1983). Indeed, this Court, in *Caffrey*, cited *DuBois* and *Adkins* as instances where past-polygraph statements were voluntary. On the facts of this

case, the polygraph test did not render Debra's statements involuntary.

Important, also, to our consideration of the totality of circumstances presented here, are Debra's repeated demonstrations of a willingness to participate in the subsequent interviews. The suppression hearing testimony of all three agents who interviewed her reveal cooperation. *She* specifically *suggested,* to DeVaney, that she be interviewed by a psychologist or be hypnotized in order to reach the truth. Similarly, during Giegling's interview, *she offered* to undergo hypnosis, psychological examination, or take a "truth serum" to jog her memory. *She asked* Giegling to "jar her memory." She exhibited manifestations of voluntariness throughout these interviews, weakening any supposition that her will was overborne. Her subjective intent and state of mind is indicated by her oral expressions to the officers that she wanted to find out what happened to her slain child. Even her emotional state at the end of the interviews does not mandate, by itself, a finding of involuntariness, as even collapse into unconsciousness after a confession might only be a release from the terrible burden of concealing a heinous crime. *Miller v. Fenton,* 796 F.2d 598, 606, 612 n. 13 (3rd Cir.1986), *cert. denied, sub nom, Miller v. Neubert,* 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed.2d 587. Mere emotionalism does not necessarily invalidate a confession. *Miller, id,* at 613.

Further, the April 7 interviews were part of a chain of instances of Debra's cooperation with the police. She signed a consent form allowing police to search her home on April 5. She voluntarily went to the Correction Center

on April 5, late in the evening, and submitted to questioning by Lindberg. She voluntarily provided the police with clothing and jewelry, going so far as to telephone Sheriff Beerman, on April 6, to offer her class ring for analysis. She consented to giving hair and blood samples. We cannot, on this record, hold the trial court's determination of voluntariness to be clearly erroneous. *State v. Gregg*, 405 N.W.2d 49, 52 (S.D.1987). Exhaustive detailed findings were entered below. On other facts, the length of examinations, *see, Colorado v. Connelly*, 479 U.S. 157, 163, 107 S.Ct. 515, 520, 93 L.Ed.2d 473, 482 (1986), or her lack of food[1] might support a finding of involuntariness. Here, however, Debra was not *deprived* of rest, refreshment, or relief. *Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir.1988). Her age (31), and education (two-year college degree) are factors weighing in favor of the trial court's findings. She was neither young, uneducated or weak-minded, and thus, capable of some degree of resistance to interrogation, had she chosen to resist. *Miller*, at 606.

The second leg of Debra's suppression argument, grounded on lack of *Miranda* warnings, fails because the April 7 interviews were not undertaken in a custodial

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[1] This Court has observed that deprivation of food and sleep, inflicted as punishment, may indicate involuntariness. *See, State v. Hartley*, 326 N.W.2d 226, 230 (S.D.1982) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). Here, however, her lack of food was due to lack of appetite, and Debra testified that she was unaware of hunger and asked for no food. A lack of food was self-inflicted. She had a plate of lunch before her on this day and refused it, as she was not hungry; later, at 2:00 p.m., she went to the police station.

situation. As noted above, Debra went to the police station voluntarily, was not restrained in any manner during her stay there, and was not taken into custody at any point. *See, State v. Graves,* 83 S.D. 600, 163 N.W.2d 542 (1968). Her own testimony at the suppression hearing indicates that no action by the police gave her any indication that she was not free to go. Morgan, J. in his dissent reflects on this factual issue but one slice of her testimony. She also testified that she had no restraint upon her. The trial judge was in a better position to decide any conflicts in evidence as he was exposed to the conduct, temperament, and demeanor of the witnesses involved. *State v. Brim,* 298 N.W.2d 73, 78 (S.D.1980). It is for the trial court to resolve conflicts in the evidence. *State v. McQuillen,* 345 N.W.2d 867, 871 (S.D.1984). As the United States Supreme Court observed in *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 (1983):

> Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving *Miranda* protection, *the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.* (emphasis added).

Beheler built on a foundation contained in *Beckwith v. United States,* 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), wherein the Supreme Court held that custody or deprivation of freedom to leave was the proper test for determining whether *Miranda* warnings need be given, not mere focus on a suspect. *See also, State v. Perkins,* 444 N.W.2d 34 (S.D.1989); *State v. Bruske,* 288 N.W.2d 319

(S.D.1980). In *State v. McQuillen*, 345 N.W.2d 867, 870 (S.D.1984), we stated:

> This Court has set forth a number of factors to be examined in determining whether an interrogation is custodial or noncustodial: probable cause to arrest, subjective intent of the defendant, focus of the investigation, nature of the interrogator, nature of the suspect, time and place of the interrogation, nature of the interrogation, and purpose of the investigation. (citations omitted).

Here, Debra's subjective intent was clearly to cooperate fully.[2] She, a mature, educated adult, was not under any restraint, at any time. Unattended, she left the interrogation room at one point, at which time *she testified that nothing prevented her leaving*. Jenner came and left of her own accord. This totally reinforces that she was not in custody. All these facts lead us to affirm the trial court. This is consistent with *Oregon v. Mathiason*, 429 U.S. 492, 496-7, 97 S.Ct. 711, 714, 50 L.Ed.2d 714, 719 (1977):

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged

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[2] The trial court's Memorandum Opinion dated January 29, 1989, was incorporated by reference into the formal Findings Of Fact and Conclusions Of Law as reflected in Fact #18: "*Lynn Jenner testified* that up through and including April 7, 1987, he and the Defendant were fully cooperative including interviews, searches, polygraph tests, and the turning over of jewelry and clothes. During this time no threats or physical violence were made against he or the Defendant." (emphasis supplied-ours).

> with a crime. *But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warning to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."* It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited. (emphasis supplied).

In short, Debra was neither in custody nor deprived of her freedom of movement.

Our recent decision in *McDowell v. Solem*, 447 N.W.2d 646 (S.D.1989), page 649 thereof, as regards no *Miranda* warnings on a taped interview of McDowell, is very akin to the case at hand. We expressed therein: "absent a custodial situation, *Miranda* warnings are not required prior to commencing an interrogation." We cited not only the *Miranda* decision but also *State v. Hall*, 353 N.W.2d 37, 40 (S.D.1984). We noted that McDowell willingly agreed to partake in interviews with the police. We noted that Debra Jenner likewise willingly agreed to participate in interviews with investigative agents here. In *McDowell*, we mentioned that McDowell, in the interviews, would express his opinion and ideas regarding the scheme of execution for the murder of his wife. Here, also, Debra Jenner had a theory as to the possible murder of her child. In *McDowell*, we mentioned that there were no restrictions on his travel; here, Debra Jenner had opportunity to come and go. In *McDowell*, we held that the taped interviews could be played to the jury " . . . as the

law enforcement officers were not required to give McDowell his *Miranda* warnings prior to these interviews." Therefore, our decision here is consistent with the *McDowell* decision. *McDowell* was a unanimous decision of this Court including the same composed members of this present *Jenner* decision.

We note appellant's attack on the conduct of the law enforcement officials involved in the questions to appellant. We express that police coercion, in and of itself, does not invalidate a confession. Further inquiry is necessary, namely, when considering coercion, is the confession still voluntary. *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). "While the state of the accused's mind, and the failure of the police to advise the accused of [her] rights, were certainly factors to be evaluated in accessing the voluntariness an accused's responses, they were not in and of themselves determinative." *State v. Hartley,* 326 N.W.2d 226, 230 (S.D.1982), quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Nor does Jenner's emotional condition, on these facts, become determinative, for "mere emotionalism and confusion do not necessarily invalidate" confessions. *Miller v. Fenton,* 796 F.2d 598, 613 (3rd Cir.1986). Here, a distressed woman came to a law enforcement facility and expressed, *inter alia,* that she wanted agent Giegling to "jar" her memory. At 5:00 p.m. on the day in question, she pledged her cooperation. Later, when the officers obtained the truth, she blurted to her husband "I did it." Having found out that she "did it", she now cries out that the officers are guilty of police coercion. If this Court accepts that there was police coercion (to get her to confess), we must still determine if, under the totality of

the circumstances, these tactics were sufficient to overbear appellant's free and rational will to thus render her admissions involuntary. We then must examine her subjective state of mind. Appellant's statements were voluntary, we must conclude, because of the totality of acts and circumstances we have extensively set forth in this opinion, including but not limited to, that she was actually begging the officers to assist her in recalling what happened or who had killed her daughter. In *Michigan v. Mosley,* 423 U.S. 96, 102, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 320 (1975) we read that suspects should be given an opportunity to make informed and intelligent assessments of their interests; here, Debra was trying to find out who killed her daughter. Apparently, when she found out that she was the one who had killed her daughter she is claiming that she was not properly Mirandized. Justice Byron White warned against a paternalistic interpretation of the *Miranda* safeguards so as not to "imprison a man in his privileges." 423 U.S. at 109, 96 S.Ct. at 329, 46 L.Ed.2d at 324. Debra had a right to look into *who* killed her daughter and to make an informed and intelligent assessment of that right.

It is necessary to examine the appellant's subjective state of mind to ascertain whether the coercion was sufficient to overbear the will of the accused. *McCall v. Dutton,* 863 F.2d 454 (6th Cir.1988); *see also, United States v. Rohrbach,* 813 F.2d 142 (8th Cir.1987). Further, a defendant must establish that her/his will was overborne because of the coercive police activity in question. If the police misconduct was not the motivating factor behind the defendant's confession, the confession is voluntary and may

not be suppressed. *McCall, supra; Hawkins v. Lynaugh,* 844 F.2d 1132 (5th Cir.1988).

The trial court, which carefully considered the suppression issue, as reflected in its voluminous findings, is affirmed on this issue. Debra's statements were voluntary, and *Miranda* warnings were not, on these unique facts, required.

Lastly, we note Justice Sabers' forceful criticism of the majority writer's position in this case, comparing same to a dissent in *State v. Meek,* 444 N.W.2d 48 (S.D.1989). *Meek* and this case are totally dissimilar in fact. Meek is therefore, inapposite. In *Meek,* we stated: "Officer Hofeldt stopped Meek's vehicle". *Meek* involved field sobriety tests and whether they are protected by the constitutional privilege against self-incrimination. *Meek* was a DUI case, whereas this case involves murder. In *Meek,* it was totally undisputed that Meek claimed his privilege against self-incrimination. He repeatedly did "plead the Fifth Amendment" – in those express words. Here, Debra Jenner never made such a claim. Furthermore, entered findings by the trial court absolutely establish, which is also undisputed, that the Jenners voluntarily traveled to the police station on April 5, 1987; the Jenners also drove to the sheriff's office on April 7, 1987. In *Meek,* we have a stopping of a vehicle on a highway which is known in law as an "investigative stop". Jenners were never "stopped"; they drove to the law enforcement facilities to cooperate. An inconsistency, suggested by Justice Sabers, bears academic scrutiny for correctness.

II. *Jury Instructions.*

Debra next asserts that the trial court committed errors in instructing the jury as to applicable law in four respects: 1) No instruction was given on the defense of unconsciousness; 2) An instruction on amnesia was improperly given; 3) The jury was not instructed about the insanity defense; and, 4) The jury was improperly instructed on pleas available to Debra. We disagree with all four allegations of error, and discuss them under one heading because all four founder on the same reef – the evidence in the case.

The law in South Dakota is well settled on the point that courts are not required to instruct as to matters which find no support in the evidence. *State v. Weatherford,* 416 N.W.2d 47, 55 (S.D.1987); *State v. Hoadley,* 319 N.W.2d 505, 507 (S.D.1982); *State v. Johnson,* 81 S.D.600, 608, 139 N.W.2d 232, 236 (1965). The evidence Debra relies on to support her arguments regarding the defenses of unconsciousness and insanity consists of her statements to the effect that she had no memory of killing Abby, and that she slept all night (while Abby died). We consider this showing inadequate to require jury instructions on either defense.

The defense of unconsciousness is based upon SDCL 22-3-1, which provides, in pertinent part: "Any person is capable of committing a crime, except those belonging to the following classes: . . . (4)Persons who committed the act charged without being conscious thereof[.]" This defense, also known as automatism, *Fulcher v. State,* 633 P.2d 142, 145 (Wyo.1981), is separate and distinct from insanity. *State v. Grooms,* 85 S.D. 532, 186 N.W.2d 889

(1971). "Although related, the defenses of insanity and unconsciousness are not the same in nature, for unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind." *Weatherford, supra,* at 55 (quoting *State v. Caddell,* 287 N.C. 266, 285, 215 S.E.2d 348, 360 (1975). On the facts of this case, Debra is trying to convert her claimed amnesia into an unconsciousness defense. "It is generally said that amnesia, in and of itself, is not a defense to a criminal charge." *Caddell,* 287 N.C., at 286, 215 S.E.2d, at 360, and amnesia alone does not entitle one to the defense of unconsciousness. *See,* 1 LaFave and Scott, Substantive Criminal Law, § 4.9, at 544 (1986). As in *Polston v. State,* 685 P.2d 1, 8 (Wyo. 1984), not a single witness, medical or otherwise testified to facts that could reasonably raise the defense of automatism, or unconsciousness. The evidence here raises no more than conjecture, which is insufficient to support an instruction to the jury. *Id.* American courts have recognized that an unconsciousness defense might be established when the defendant's condition is brought about by any of a variety of circumstances, including epilepsy, somnambulism, hypnotism, some physical trauma, or even emotional trauma. LaFave and Scott, § 4.9, at 543. Without embracing all of these causes for unconsciousness defenses, we note that no testimony indicated that Debra was suffering from a condition caused by any such circumstances.

There is even less justification for Debra's arguments that she was entitled to an insanity defense. There was no testimony, of any sort, indicating that she was suffering from a mental disease or defect which affected her mental

faculties in such a way as to require an insanity instruction. *See, Weatherford, supra,* at 55 (interpreting SDCL 22-1-2(18A), now SDCL 22-1-2(20)). Insanity is statutorily defined as "the condition of a person temporarily or partially deprived of reason, upon proof that, at the time of committing the act charged against him, he was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior." SDCL 22-1-2(20). As Debra has presented no evidence of her being incapable of knowing her acts were wrong at the time Abby was killed, the trial court was correct to decline to instruct the jury in that regard.

Debra's remaining two jury instruction arguments are without merit. The trial court's instruction on amnesia read: "You are instructed that amnesia or loss of memory is not a defense to a crime." Given the evidence in this case, as noted above, this instruction was a correct statement of the law. If Jenner's amnesia had been linked to evidence indicating that she was suffering from a condition rendering her unable to know the nature of her act and the act was wrongful, the given instruction would have been incomplete, but such evidence was not presented in this case. As the Supreme Court of North Carolina has written, amnesia is no defense to a criminal charge; that a defendant is subsequently unable to remember is in itself no proof of his mental condition at the time the crime was committed. *State v. Bock,* 288 N.C. 145, 217 S.E.2d 513 (1976). The rationale for this is simple: "Amnesia is a neutral circumstance, or symptom, unless connected to a precipitating cause." *Jackson v. State,* 149

Ga.App. 253, 255, 253 S.E.2d 874, 876 (1979). We find no error here.

The last challenge to the trial court's jury instructions is Debra's argument that the trial court erred by instructing on the various pleas available to a criminal defendant which concluded:

> As stated, the Defendant in this case has entered a plea of not guilty. Therefore, your deliberations should be confined to the determination of whether the defendant killed Abby Lynn Jenner, and, if so, whether she did it in the manner in which she has been charged in either Count I or Count II of the Indictment.

Debra argues that this instruction "appears to be another attempt to make sure . . . that the jury did not delve in their deliberations into [un]consciousness and/or insanity[.]" As insanity and unconsciousness were not issues raised by the evidence in this case, we perceive no reason to belabor this point. Further, Debra assails this instruction because it makes no reference to "reasonable doubt" or "general intent," while conceding that these two matters were the subject of separate instructions. The trial court's instructions, when read as a whole, were adequate. This satisfies well settled law in this Court. *State v. Jaques*, 428 N.W.2d 260, 266 (S.D.1988)

III. *Third Party Perpetrator Evidence.*

With a backdrop of admitting that she killed her daughter, appellant contends that a third party could conceivably have killed her little girl. Notwithstanding, we address this argument in legal merit.

The trial court excluded third party perpetrator evidence proffered by Debra, granting a pretrial motion in limine on such evidence until Debra made a showing that such evidence satisfied a balancing test set out in *State v. Luna*, 378 N.W.2d 229 (S.D. 1985).

In *Luna*, at 234, this Court adopted a position based upon *Perry v. Rushen*, 713 F.2d 1447, at 1452 (9th Cir.1983) (quoted in *Luna*, at 234):

> When the State interest is strong, only the exclusion of article, reliable and highly probative evidence will violate due process. When the State interest is weaker, less significant evidence is protected. . . . [T]he court must balance the importance of the evidence against the state interest in exclusion.

Appellant stresses that *Perry* was based upon a line of California caselaw which has since been modified. *See, People v. Hall*, 41 Cal.3d 826, 226 Cal.Rptr. 112, 718 P.2d 99 (Cal.1986):

> We reject [*People v.] Arline*, 13 Cal. App.3d 200, 91 Cal.Rptr. 520 [(1970)] to the extent that it creates a distinct and elevated standard for admitting this kind of exculpatory evidence. Rather than speaking in terms of a *[People v.] Mendez* [193 Cal. 39, 223 P. 65 (1924)] – *Arline* "rule," courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible (note omitted) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion. (note omitted).

The extreme position overruled in Hall, however, was not adopted in *Luna*. We observed, in *Luna*, at 233, that "State

evidentiary rules may not be applied mechanistically to defeat the ends of justice." The rule expressed in *Luna* does not infringe upon Debra's right to due process for the reason that the evidence, in her case, is so weak in probative value and presents such an opportunity to confuse the jury and to waste time (See SDCL 19-12-3 and F.R.E. 403) to a far greater degree than in *Luna*.

The evidence excluded by the trial court is as follows:

1. Debra's neighbor secured restraining orders against her ex-husband to avoid physical abuse;

2. A woman telephoned the neighbor's house at 1:50 a.m. on the night Abby died, asking for Russell (the ex-husband's name was Russell);

3. A guest at the neighbor's party on the night Abby died saw a man she did not know walking near the Jenner home at 11:30 p.m.; and,

4. A man was seen in the graveyard where Abby was buried eight days after she died, who dressed similarly to the man seen walking near the Jenner home.

We deem this evidence has no relevance, and the trial court was correct to exclude it under SDCL 19-12-3, of which *Luna* is simply an illustration.[3] we find no error here.

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[3] In *Luna* the defendant had a far stronger argument, as the third party perpetrator's evidence included a violent drunk who was near the crime scene, covered in blood, shortly after a killing, and confessed.

IV. *Sufficiency of Evidence.*

Appellant's last argument is that the evidence presented at trial was insufficient to support her conviction. The trial court denied her motion for judgment of acquittal at the close of the State's case, and renewed at the close of evidence. This argument has two components: 1) SDCL 22-16-7, requires an act "imminently dangerous to others," whereas the attack on Abby was a danger only to her; and, 2) no evidence connects Debra to the crime. We strongly disagree with both assertions.

As to the definition of second degree murder in SDCL 22-16-7, we note that SDCL 2-14-6 provides: "Words used in the singular number include the plural, and the plural, the singular, except where a contrary intention plainly appears." we perceive no contrary intention in SDCL 22-16-7, and adopt the position of the Supreme Court of Maryland in *Robinson v. State,* 307 Md. 738, 751, 517 A.2d 94, 101 (1986), which held "depraved heart murder" to "not require more than one life be placed in imminent danger by an assailant's life-threatening act":

> We reach this conclusion because of what we have already said about the blameworthiness of an act that, without intent to kill, nevertheless produces that result because of the action's reckless disregard for the likely fatal consequences of the act. We are not persuaded that such act is punishable as second degree murder only when several potential victims are involved.

Robinson, 307 Md. at 751, 517 A.2d at 101. This is in accord with *State v. Lowe,* 66 Minn. 296, 68 N.W. 1094 (1896) and

Hogan v. State, 36 Wis. 226 (1864), *contra, Darry v. People*, 10 N.Y. 120, 4 N.Y.S. 137 (1854).

Appellant relies on *State v. Reddington*, 7 S.D. 368, 379, 64 N.W. 170, 174 (1895), for the proposition that "where one state adopts the statute of another state it takes it impressed with the meaning and construction which had been judicially given it at the time of its adoption[,]" with its observation that our territorial legislature "evidently" borrowed New York's murder statutes in enacting the Penal Code in 1865, in attempting to lock res into the long-superceded interpretation in *Darry*. The murder statute in *Darry* was in common use, as *Robinson* indicates, and interpretations of the point now in question varied. The legislative intent in 1865 is too murky to cleave in so facile a manner, especially as the *Reddington* court's use of "evidently" does not reflect certainty.

Finally, we consider Debra's last argument, that there is no evidence connecting her to Abby's killing. Her position is without merit, as she no more than derides unfavorable evidence, and inferences therefrom, as "speculation." *State v. Miller*, 429 N.W.2d 26, 38 (S.D.1988). In determining the sufficiency of evidence on appeal, the question presented is whether there is evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt. *Miller, id.* In making this determination, the Court will accept that evidence, and the most favorable inferences fairly drawn therefrom, which will support the verdict. *Miller, id.* All elements of a crime, including intent, may be proven with circumstantial evidence. *State v. Cody*, 323 N.W.2d 863, 869 (S.D.1982).

The evidence against Debra includes her own statements, in which she provided information which tallies with the physical evidence, example being the model plane, which fits one wound "uniquely"; and when she remarked that her hair was down, and Abby pulled it, it tallies with the hair samples taken from Abby's body. This is highly damning against her. Debra said she might have "gone click" or "psyched out," terms completely undefined in the record, yet the devastation visited on Abby was characterized, by an expert, as a "frenzy." The child's body was mutilated by the seventy stab wounds. Debra described Abby as being on her stomach and resisting, truly, as evidenced by the placement and nature of Abby's wounds.

Although the defense tried to maintain that the Jenners' outside doors were unlocked, Debra told officer DeVaney that the front door was locked, and other testimony established that the back door was not quick to open, i.e., locked. There was absolutely no evidence of forced entry into the Jenner home. Debra also was quoted as saying "I did it, I did it," and although she later denied using these words, the testimony stands. Clothing similar to that she once claimed to have worn to bed on the night in question, was found in a laundry hamper next to a washing machine, corresponding to her references to having cleaned up after Abby's death. She made statements to friends and co-workers – that she would accept going to an institution but did not want to go to prison – that there was a war inside her between God and Satan, and that Abby's death was the work of Satan – and then tried to telephonically tell the grand jury witnesses, Kay Brink and Joan Bieyer, in the days before their testimony, on

how to testify. Debra told police that she could not smell blood in Abby's room, yet she washed her hands repeatedly that morning, complaining that she could not get rid of the smell. Her ring, voluntarily given to police as reportedly unscrubbed, was apparently washed often that day – it was on her finger. Appellant's bedroom was only twenty feet from the murder scene. The murder weapons – a Chicago Cutlery knife and a toy airplane – came from within the Jenner home. Appellant testified that she could hear her children walking to the bedroom door when they needed assistance at night, yet testified that she slept through Abby's killing although physical evidence indicated that the little girl struggled in the course of a prolonged attack. Different weapons were used and seventy stab wounds are consistent with a conclusion of a prolonged attack. Appellant admitted that the little girl was "hyper" in previous days and soiled her pants several times the previous day; she informed a friend that the little girl was irrational the night of the killing. A mass of circumstantial and direct evidence convinced this jury, beyond a reasonable doubt, that appellant had murdered her own three and half year old daughter. The evidence, and inference therefrom, was sufficient. A guilty verdict will not be set aside if the State's evidence, concerning all favorable inferences to be drawn therefrom, supports a rational theory of guilt. *State v. Dale*, 360 N.W.2d 687, 690-91 (S.D.1985). Jury instruction No. 22 correctly instructed the jury on both direct and circumstantial evidence.

State's Notice of Review (16240)

As we affirm Debra's conviction, we do not address the State's argument that she was charged with two

distinct statutory violations and could be convicted of both. The trial court instructed the jury that second degree murder and first degree manslaughter were alternative counts, and the jury, therefore, acquitted her of one count. This issue, of interest if retrial was ordered by this Court, is moot on affirmance.

Conviction and sentence affirmed.

WUEST, C.J., and MILLER, J., concur.

MORGAN and SABERS, JJ., dissent.

MORGAN, Justice (dissenting).

I join in Justice Sabers' dissent, but I write to express my frustration in reviewing this case.

First of all, I am appalled by the failure of the DCI agents to record the interrogation proceedings of April 7, 1987. It is inconceivable to me that they would gather a team of agents from across the state, with two sets of polygraph equipment, and not have any form of tape recorded available. Thus, we are left with the testimony of the agents and Debra for the details of an extended interrogation and that testimony was not given until some nine months later, on January 6, 1988. It is of further interest to me that the authorities did not seek an indictment until over four and one-half months after the interview.

The trial court, in its findings of fact for the suppression hearing, set the scene for this interview. It described the examination/interrogation room as being 12 by 14 feet, furnished with a table, 3 or 4 chairs, and a filing cabinet, with no windows to the outside and a one-way glass window for observation into the room. The room

was bugged for listening but not recording and had no clock, radio or taping equipment. This was the milieu in which Debra found herself for some six or seven hours of interrogation except for two occasions when she went to the bathroom, the location of which we are not apprised of in the record.

Justice Sabers has detailed the interrogation procedures used on Debra, and I shall not repeat them except for two points that I wish to make.

First, the trial court finds certain instances where Debra talked of "psyching out" and suggested hypnotism, truth serum or psychiatry. This is relied on heavily by the majority to demonstrate cooperation on Debra's part. I suggest, however, that the trial court and the majority ignore the fact, as found by the trial court, that both Devaney and Giegling had planted the seed in Debra's mind that "there is a rational Debbie and an irrational Debbie," and "a good Debbie and a bad Debbie." Again the trial court and the majority stress Debra's statement to her husband, Lynn, when he was brought into the room: "I did it, I did it. Did you help me?" When Lynn said that he did not help her, as the record shows, Debra then recanted. That recantation is entirely overlooked in the finding as is the fact that the agents had previously lied to Debra *that Lynn had told them that she had done it.*

One of the trial court's findings is enigmatic in that it first finds that neither of the Jenners were advised of their *Miranda* rights and, further, that neither requested counsel, or that the questioning stop and never refused to answer a question. It is incomprehensible that any court

could conclude that Debra's cooperation could be evidenced by her failure to exercise her *Miranda* rights when she had not been advised of those rights.[1] Nor can I agree with Justice Henderson that his writing in *State v. Meek*, 444 N.W.2d 48 (S.D. 1989), is totally distinguishable because Meek was a DUI case and this is a murder case. *The Fifth Amendment does not distinguish between the crimes involved.* One suspected of murder, even as heinous an offense as this is, is surely entitled to the same constitutional rights as a drunk-driving suspect. We cannot ship away constitutional protections for murder suspects and strenuously enforce them for drunk-driving suspects.

The majority stresses that Debra testified that nothing prevented her from leaving; however, I note in her testimony, when asked by her counsel: "Did you feel you had any right to leave if you wanted to?" She responded: "No."

Justice Potter Stewart, writing in *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), warned that: "Determination of whether a statement is involuntary 'requires more than a mere color matching of cases.' " 437 U.S. at 401, 98 S.Ct. at 2418, 57 L.Ed.2d at 306 (citation

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[1] The majority citation to *Michigan v. Mosley*, 423 U.S. at 102, 96 S.Ct. at 326, 46 L.Ed.2d at 320, is likewise incomprehensible inasmuch as *Mosley* dealt with the issue of interrogation after a defendant had been properly warned and had exercised his right not to talk. In the context of this case, the references to "informed and intelligent assessment" is ludicrous because Debra was never given any warning. The quotation from Justice White's concurrence was with respect to a person's right to make an informed waiver of *Miranda* rights. Read *in that context*, I have no quarrel with the statement.

omitted). That is what I think that the majority has done. The opinion cites numerous cases to support the various factors individually, *e.g.*, failure to give the *Miranda* warning, polygraph testing, emotional state, cooperation, and interrogation methods. However, I find no citation for the proposition that the voluntariness of a confession must be judged by the "totality of circumstances" test; that is, the whole of the events is distinct from the parts. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Though the majority makes passing reference to "totality of the circumstances" and the trial court obviously tried to apply the rule, neither seems to understand the rule's import. The reason a court examines the totality of factors is that individually the factors may not in themselves be enough to overbear a person's will. *But combined, they react with one another and produce a synergistic evil, one greater than its individual parts.* Here, Debra's lack of sleep, or her inexperience, or lies told to her by DCI agents, or the yelling and screaming at her, or the length of the interrogation, each in itself may have not been enough to overbear her will and render her statement involuntary. But combined, all these factors produced a greater evil than their parts and overbore her will and rendered her statements involuntary.

Finally, although I agree with Justice Sabers and would reverse under the clearly erroneous scope of review, I think that it is time to recognize the need for a change to what the federal courts denominate a "plenary review," because the ultimate issue of voluntariness is a mixed question of law and fact that should be reviewed as a question of law. Granted, as the majority toilsomely

points out, our precedent for standard of review on the issue of voluntariness is the clearly erroneous standard as applicable to any factual issue. That is not to say that for good reason that standard cannot be changed. Justice Henderson has gone to great length to enumerate the cases wherein the various members of this court have written or voted in support of the present scope of review. I acknowledge those votes and writings attributed to me, but that does not mean that I cannot alter my position when the proper case comes along. I so indicated in my special concurrence in *Walz v. City of Hudson*, 327 N.W.2d 120 (1982), wherein this court overruled past precedent, particularly *Griffin v. Sebek*, 90 S.D. 692, 245 N.W.2d 481 (1976), and created a right of action for negligent sale of alcoholic beverages to an intoxicated person. Then Chief Justice Fosheim authored that opinion and was joined by Justices Dunn and Henderson. Justices Wollman and Morgan concurred specially. I then stated that "I am not loath to fly in the face of stare decisis and overrule a bad decision or one that is outdated." Justice Wollman's writing is especially pertinent in explaining his reversal of his stance in *Griffin* by quoting Justice Frankfurther's aphorism that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259, 264 (1949) (Frankfurter, J. dissenting).

And, as we said earlier in *State v. Nuwi Nini*, 262 N.W.2d 758, 761 (1978):

> If there is to be stability and an evenhanded administration of justice, this court must follow its own precedent until convinced that its earlier

decision was wrong, not in result, but in principle.

It is my position that the principle of considering voluntariness as a factual question is wrong. It should be considered as a mixed question of fact and law. The trial court does not find such underlying factual issues as length and circumstances of interrogation, the size of the interrogation room, Debra's age and experience, and it is entitled to be upheld on those factual determinations unless they are clearly erroneous in the light of the entire record. However, once these determinations are made, the trial court is in no better position than we are to judge *the totality of the circumstances* to determine whether the confession was obtained in violation of the due process clause of the 14th Amendment. *Fenton II*, 474 U.S. at 117, 106 S.Ct. at 453, 88 L.Ed.2d at 415. These latter determinations are legal in nature and viewing the witness is unnecessary in arriving at the proper decision. We can give deference to the trial court's findings of fact where supported by the record under the clearly erroneous standard, but the question of how those facts combine to produce lack of voluntariness and deprivation of due process is a legal question that requires de novo review.

Further, there is a question of playing on an even-playing field. The majority cites numerous federal cases for various positions to uphold the voluntariness of Debra's statements, but those cases were decided using a plenary review. In the event of appeal or petition for habeas corpus, this decision would be reviewed by plenary standards. That is mandated, as stated in *Miller v.*

Fenton, (*Fenton II*)[2] wherein the United States Supreme Court said:

> Without exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination. . . . As recently as 1978, the Court reaffirmed that it was 'not bound by' a state-court voluntariness finding and reiterated its historic 'duty to make an independent evaluation of the record." (Citations omitted.)

474 U.S. at 110, 106 S.Ct. at 450, 88 L.Ed.2d at 411. The federal courts use this standard in habeas corpus proceedings as well as direct appeals. *Id.* As Justice O'Connor stated in *Fenton II:*

> [T]he nature of the inquiry itself lends support to the conclusion that 'voluntariness' is a legal question meriting independent consideration in a federal habeas corpus proceeding. Although sometimes framed as an issue of 'psychological fact,' . . . the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. . . . This hybrid quality of the voluntariness inquiry, subsuming, as it does, a 'complex of values,' . . . itself militates against treating the question as one of simple historical fact.

474 U.S. at 115-16, 106 S.Ct. at 453, 88 L.Ed.2d at 411-15 (footnote omitted) (citations omitted). While it may be

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[2] *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (*Fenton II*), was an appeal from *Miller v. Fenton*, 741 F.2d 1456 (3rd Cir. 1984) (*Fenton I*), and directed the remand that resulted in *Miller v. Fenton*, 796 F.2d 598 (3rd Cir.1986) (*Fenton III*), quoted frequently in the majority opinion.

that the federal court decisions on standards of review are only persuasive and not binding precedent, and the federal courts will still make an independent examination, it seems logical to me that we should take advantage of playing on a level field.

I would reverse the conviction and remand for a new trial.

SABERS, Justice (dissenting).

Debra Jenner is entitled to a new trial. The State failed to meet its burden of proof beyond a reasonable doubt that these statements were freely and voluntarily given. In addition, the State wholly failed to give required *Miranda* warnings in a custodial setting.

1. *Admission of statements made by Jenner to the police on April 7, 1987.*

Jenner claims that the trial court erred in admitting the statements she made to the police on April 7, 1987. She claims these statements were involuntary and violated her right to a fair trial under the Due Process Clause. She also claims the statements should have been suppressed because she was not advised of her *Miranda* rights. In response, the State argues that the trial court did not err in finding Jenner's statements voluntary and that no *Miranda* warnings were necessary as she was not in custody.

A. Voluntariness of Jenner's statements.

The use of involuntarily obtained confessions or statements deprive a defendant of due process of law. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). As stated in *Miller:*

> This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.

Id., 474 U.S. at 109, 106 S.Ct. at 449, 88 L.Ed.2d at 410. The Supreme Court has stated that our criminal system is "an accusatorial and not an inquisitorial system," and the tactics used to elicit inculpatory statements must fall within the constitutional boundaries imposed by the Due Process Clause of the Fourteenth Amendment *Rogers v. Richmond*, 365 U.S. 534, 541, 81 S.Ct. 735, 739, 5 L.Ed.2d 760, 766 (1961). The Court has continued to require that confessions be voluntary to satisfy the requirements of due process. *Miller, supra*, even after *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which extended the privilege against self-incrimination to custodial interrogations.

The voluntariness of a defendant's statements is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d. 854 (1973); *State v. Hallman*, 391

N.W.2d 191 (S.D. 1986); *State v. Hartley,* 326 N.W.2d 226 (S.D. 1982). The Supreme Court has set out the following inquiry to determine voluntariness:

> 'Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'
>
> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advise to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. In all these cases, the Court determined the factual circumstances surrounding the confession assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted.

Schneckloth, supra, 412 U.S. at 225-26, 93 S.Ct. at 2047, 36 L.Ed.2d at 862. (citations and footnote omitted).

The State has the burden to prove *beyond a reasonable doubt* that a statement was freely and voluntarily made by a defendant. *State v. Gregg,* 405 N.W.2d 49 (S.D.1987); *State v. Volk,* 331 N.W.2d 67 (S.D.1983); *State v. Hintz,* 318

N.W.2d 915 (S.D.1982). In reviewing the trial court's finding on voluntariness, we must consider the evidence in the light most favorable to the decision and may reverse the decision only if we find it to be clearly erroneous. *Hallman, supra; State v. Janis,* 356 N.W.2d 916 (S.D.1984).

The totality of the circumstances requires an examination of both 1) the characteristics of the accused and 2) the details of the interrogation. *Schneckloth, supra.* In considering the characteristics of the accused, the trial court noted that Jenner had not slept much prior to the examination and that she had not eaten that day. The court also noted that she was intelligent and educated. These are the only facts the court considered as to the characteristics of the accused. The court concluded: "I do not feel that the lack of sleep or food affected the Defendant to such an extent that it would make her statements involuntary." Jenner argues that the trial court failed to consider the emotional and physical drain from the recent loss of her daughter. She argues that the court failed to mention her lack of previous experience with law enforcement and her deep respect for authority ingrained from her religious beliefs. Jenner also claims that the court considered her characteristics in isolation, rather than in connection with the effect the eight-hour interrogation had upon these characteristics, as required by the totality of the circumstances test.

We are hampered in our review of the interrogation itself, as was the trial court, because the agents failed to record the interrogation. However, it is undisputed that the DCI agents became accusatory immediately after the polygraph examination. Following the polygraph, three different agents took turns questioning Jenner from 3:30

p.m. until approximately 10:00 p.m. During this time Jenner was never informed of her constitutional rights. The agents used various interrogation techniques which they admitted were aimed at compelling Jenner to confess. The agents repeatedly told Jenner that they did not believe her and that she should tell them the truth about her daughter's death. The interrogation techniques included yelling and the use of false, hypothetical questions, such as her husband having told the agents that she committed the murder. The record reveals that the interrogators also played upon her strong religious convictions and her sex life with her husband. The interrogation continued through an evening family memorial service on the eve of Abby's funeral. During these six hours of intense interrogation, the agents permitted Jenner to make two trips to the rest room and brought her one Diet Coke. There were no other breaks until Agent Giegling decided to terminate the interrogation because he concluded that Jenner was suffering a nervous breakdown. The agents testified that Jenner's emotional state during the interrogation varied from calm to hysterical. There were times that she would cry and sob, while other times she would stare in complete silence.

While the use of certain interrogation techniques does not of itself invalidate a confession under the Due Process Clause, such techniques are important to the inquiry, and must be considered together with the characteristics of the accused. *Miller, supra; Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). The Court has noted that such techniques may cross the line between "permissible police conduct" and "methods offensive to due process." *Haynes, supra.* In this case, the

psychological impact of these techniques upon Jenner was immense.

The State argues that Jenner made several comments during the interrogation which indicated the voluntariness of her statements. At one point she asked Agent DeVaney if he could hypnotize her to help her remember. At another point she asked Agent Giegling if he could "jar her memory." While these statements are relevant in considering the totality of the circumstances, they are not controlling and must be viewed in the context of the interrogation. If anything, these statements indicate Jenner's emotional breakdown, rather than any desire to make voluntary statements.

The trial court placed great emphasis on Jenner's comments and the fact that she seemed to cooperate completely with the agents and never expressed a desire to terminate the interview. The court stated:

> The one common thread throughout this whole proceeding which was glaringly evident to this Court was the total voluntary cooperation by the Defendant. She voluntarily came to the police station, accompanied by her family and friends; she voluntarily took the polygraph test and continually answered questions knowing she did not have to do so; she voluntarily provided physical evidence; she voluntarily signed consent forms; and she knew her husband had signed search consent forms. In short, the Defendant did not have to come down to the station, did not have to take any tests, did not have to answer any questions, and could leave at any time she wanted, and was well aware of her rights in this regard. The Defendant simply

> and unequivocally voluntarily cooperated with the law enforcement.

Clearly, Jenner did not "know" that she could stop answering questions and was not "well aware of her rights" because the agents completely failed to inform her of these rights. Further, she did not know she was free to leave, if in fact, she was. Though Jenner appeared generally cooperative with the agents, the State had the burden to prove beyond a reasonable doubt that this cooperation was of her own volition and not because her will was overborne during the interrogation. The State cannot meet this burden under the totality of the circumstances. Furthermore, mere *cooperation* in the early stages of a lengthy investigation does not make a statement voluntary. The majority ignores the fact that an intense, psychologically coercive interrogation intervened between the initial cooperation and the statements in question. The nature of that interrogation precludes the possibility of the statements actually being free and voluntary.

The State argues that deference must be given to the trial court's decision, as the trial court is better able to determine the credibility of the witnesses. *State v. Stumes*, 90 S.D. 382, 241 N.W.2d 587 (1976). However, in this case most of the evidence of the interrogation is not disputed. It is undisputed that Jenner was never informed of her rights and that she was subjected to more than six hours of intense interrogation during which she was repeatedly accused of not telling the truth. It is undisputed that she was under a great deal of stress and trauma and that she had little sleep prior to the interrogation. It is clear that the agents used psychologically coercive interrogation

techniques which caused Jenner to break down emotionally. Further, in finding that Jenner's statements were voluntary the court emphasized certain evidence without assessing the totality of circumstances. In addition, the failure of the agents to record the interrogation with the listening and recording devices available to them makes it difficult for the State to sustain its burden. The testimony at the suppression hearing, which is the only evidence available to review, does not support the trial court's finding that Jenner's statements were voluntary beyond a reasonable doubt. Substantial doubt not only exists, it prevails. We should hold the trial court was *clearly erroneous* in determining that Jenner's statements were voluntary and their use at trial violated her constitutional right to due process.

B. Failure to give *Miranda* rights.

The record also supports Jenner's claim that the agents' failure to advise her of her constitutional rights required suppression of the statements. The State concedes that the agents failed to read Jenner her *Miranda* rights, and I reject the State's claim that no *Miranda* warnings were necessary because Jenner was not in custody during the questioning.

In *Miranda* the Supreme Court held that a suspect must be advised of the right to remain silent and the right to an attorney prior to any custodial interrogation. *See also Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). The *Miranda* Court stated that failure to give *Miranda* warnings under such circumstances creates a presumption of improper compulsion.

> [O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. (citations omitted).

Id. 384 U.S. at 460, 86 S.Ct. at 1620, 16 L.Ed.2d at 715. The question of custody depends upon whether "the person being questioned is in custody or deprived of his or her freedom to leave." *State v. Bruske*, 288 N.W.2d 319, 322 (S.D.1980). Though Jenner was not formally "in custody" on April 7, she was deprived of her freedom of action in a significant way.

In *State v. McQuillen*, 345 N.W.2d 867, 870 (S.D.1984), we stated:

> This court has set forth a number of factors to be examined in determining whether an interrogation is custodial or noncustodial: probable cause to arrest, subjective intent of the defendant, focus of the investigation, nature of the interrogator, nature of the suspect, time and place of the interrogation, nature of the interrogation, and purpose of the investigation.

Although the police may not have had probable cause to arrest Jenner at the start of the interrogation, the other factors listed in *McQuillen* all tend to show that she was in custody.

The State argues that Jenner complied with all the officers' questions and never tried to stop the interview. However, Jenner testified that she believed she was not free to leave. She also voiced an objection to the interrogation by asking Agent Giegling "Why are you putting

me through this[.]" The agent apologized and then continued with his interrogation. It is apparent that the investigation focused on Jenner as the prime suspect. In addition, this was not a short interrogation as that in *McQuillen*[1] and it was often hostile and accusatory toward Jenner. In *McQuillen* the court noted that the conversation between the police officer and the suspect was calm and neither accusatory nor hostile. Further, this was Jenner's first experience with law enforcement. Finally, the sole purpose of the interrogation was to obtain a confession from Jenner, not to gather further general information for the investigation of Abby's murder. Under these circumstances, Jenner was in custody and *Miranda* warnings should have been given to her prior to the interrogation.

The majority overemphasizes its claim that Jenner was not actually physically restrained. Physical restraint is only one of many factors to be considered and is not dispositive in this case. When all the *McQuillen* factors are considered, it is evident that Jenner was subjected to a custodial interrogation even though she may have been allowed to get up and walk out.[2]

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[1] In McQuillen, the defendant was interviewed twice in a locked interrogation room. The first interview lasted twenty to thirty minutes. There is no indication as to the length of the second interview, but it also appears to have been short.

[2] In fact, the Colorado Supreme Court found a custodial interrogation in somewhat similar circumstances even though the defendant was not forced to submit to questioning. In *People v. Longoria*, 717 P.2d 497 (Colo.1986), the court determined the questioning of the defendant constituted a custodial interrogation where the police officers asked the defendant to accompany

As the author of the majority opinion, Justice Henderson wholly ignores what he said recently in *State v. Meek*, 444 N.W.2d 48, 51-52 (S.D.1989):

> Further, Meek was cajoled into taking the tests, an indication that his efforts were involuntary; note the majority opinion wherein police officer is quoted saying that it would be to Meek's "advantage to try to do some tests . . . ", in other words, to incriminate himself. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The purpose of the officer's actions, here, were to elicit incriminating responses, i.e., to gather incriminating evidence. Meek was, consequently, under the functional equivalent of interrogation, as defined in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).
>
> The circumstances of this case warranted suppression. The majority's reversal of the trial court is but one more in a series of cases which have chipped away constitutional protections for South Dakotans.
>
> > Erosions of liberty do not come in giant leaps, they come in miniscule encroachments often hidden to the trained and educated mind. Like a thief in the night language can steal a liberty deeply ingrained in the fabric of the American way of life. I am afraid of each little encroachment on the liberty of my fellow Americans on the highway.

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them to the police station to talk about a sexual assault. The officers specifically informed the defendant he was not under arrest.

> *State v. Anderson*, 331 N.W.2d 568, 573 (S.D.1983) (Henderson, J., concurring in result). Here, the long-standing right against self-incrimination is being gradually eroded.

The obvious inconsistency in Justice Henderson's writings reminds me of the saying: "Those who cannot remember the past are condemned to repeat it."[3]

We recently held that *Miranda* is a bright line rule which must be adhered to when a person is in custody. *Satter v. Solem*, 434 N.W.2d 725 (S.D.1989), *cert. denied, Rist v. Satter*, ___ U.S. ___, 109 S.Ct. 2432, 104 L.Ed.2d 989 (1989). *Satter* states: "After all, it requires no great effort to take out the *Miranda* card, read the subject his rights, and ask the simple questions: Do you understand you rights and do you waive them?" *Id.* at 727. The failure to administer *Miranda* warnings creates a presumption of compulsion and any unwarned statements must be suppressed. *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985); *Satter, supra*. The statements made by Jenner following the lie detector test should have been suppressed, as they are in violation of *Miranda*.

> Can a reasonable person really conclude: that the State met its burden of proof that these statements were voluntary *beyond a reasonable doubt?*
>
> When recording equipment was available but no recordings were made or even attempted.
>
> When trickery was used in the interrogation.

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[3] G. Santayana, *The Life of Reason* 82 (1954).

> When experienced, intelligent officers failed to give required *Miranda* warnings.
>
> When the officers quit only when they feared an immediate nervous breakdown.

To me, it is not even a close question that the statements were *in* voluntary. This is so without regard to the standard of review used: clearly erroneous or mixed question of fact and law necessitating full review. However, I join Justice Morgan's dissent in all respects.

Because we should reverse and remand for a new trial on Issue 1, it is not necessary to discuss the other issues raised by Jenner. We should also reject the State's notice of review questions without discussion.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DEBRA SUE JENNER,	*	CIV90-4068
Petitioner,	*	JUDGMENT OF
vs.	*	DISMISSAL
WALTER LEAPLEY, Warden, South Dakota State Penitentiary, and ROGER TELLINGHUISEN, Attorney General, State of South Dakota,	*	(Filed Sept. 27, 1991)
Respondents.	*	

The above-entitled matter having come on before the Court and the Court having entered its Memorandum Opinion and Order, it is hereby

ORDERED, ADJUDGED AND DECREED that petitioner's Petition For Writ of Habeas Corpus is denied and this action is hereby dismissed with prejudice.

Dated this 28th day of February, 1991.

/s/ William F. Clayton
WILLIAM F. CLAYTON, Clerk
U. S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DEBRA SUE JENNER,	*	CIV 90-4068
Plaintiff,	*	
vs.	*	MEMORANDUM OPINION and ORDER
JAMES SMITH, Superintendent, Springfield Correctional Facility, and ROGER TELLINGHUISEN, Attorney General, State of South Dakota,	*	(Filed Sept. 26, 1991)
Defendants.	*	

APPEARANCES:

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The petitioner, Debra Sue Jenner, is currently incarcerated in the South Dakota State Penitentiary after conviction of second degree murder for killing her three-year-old daughter. She has requested a writ of habeas corpus pursuant to 28 U.S.C. § 2254 based on three

alleged trial court errors: I. Statements of the petitioner were improperly admitted in violation of her constitutional rights; II. The trial court's refusal to give jury instructions on the issue of unconsciousness was a denial of due process; III. The trial court's refusal to admit third party perpetrator evidence was a denial of defendant's Fifth and Sixth Amendment rights. A hearing on the merits was held on December 10, 1990.

For the reasons set out below, the Court finds that Ms. Jenner is not entitled to a writ of habeas corpus.

FACTS

Ms. Jenner's state habeas corpus petition was denied by the Supreme Court of South Dakota in a 3-2 opinion. *State v. Jenner,* 451 N.W.2d 710 (S.D. 1990). The facts of this case are set out in that opinion. Other facts will be set forth where necessary to resolve the issues.

ANALYSIS

I. THE ADMISSION OF STATEMENTS GIVEN BY DEFENDANT WAS NOT UNCONSTITUTIONAL.

The petitioner alleges that the admission of statements she made to police officers on April 7, 1987, during trial was a violation of her due process rights because the statements were not voluntary. She also alleges a constitutional violation in the admission of these statements because she had not been Mirandized before giving these statements to the police.

A. Voluntariness

The issue of voluntariness of confessions is a legal inquiry requiring plenary review. *Russell v. Jones,* 886 F.2d 149, 151 (8th Cir. 1989), *reh'g denied en banc* (1989) (citations omitted). Unlike a direct appeal, on collateral review the burden of proving involuntariness rests with the habeas petitioner. *Sumpter v. Nix,* 863 F.2d 563, 565 (8th Cir. 1988).

A predicate to finding a confession involuntary within the meaning of the Due Process Clause is coercive police activity. *Colorado v. Connelly,* 479 U.S. 157, 167 (1986). The voluntariness of a confession is evaluated in light of the totality of the circumstances, "considering the specific interrogation tactics employed, the details of the interrogation, and the characteristics of the accused." *Russell,* 886 F.2d at 151. The mental state of the defendant alone is not sufficient to make the statement involuntary. *Connelly,* 479 U.S. at 165. Nor is the fact that the interrogation took place in a police station and was conducted by police officers enough to make a confession involuntary; any interview conducted by police has a coercive nature to it simply because they are part of the system which could eventually charge the person with a crime. *U.S. v. Jorgensen,* 871 F.2d 725, 729 (8th Cir. 1989). The focus in the issue of voluntariness of a confession is on whether the pressures exerted on the suspect have overborne his/her will. *Id.* Two factors must be analyzed, the coercive nature of the police conduct and the ability of the suspect to resist pressure to confess. *Jorgensen,* 871 F.2d at 729.

The facts of this case make it clear that Ms. Jenner was at the police station voluntarily and remained there voluntarily. Though the police had requested that the Jenners come to the station for questioning, the Jenners voluntarily did so, arriving about 2:00 p.m. on April 7, 1987, accompanied by Lynn Jenner's parents and their pastor. Upon their arrival, DCI Agent Lindberg requested that both Lynn and Debra take polygraph examinations. It was explained that the taking of the test was voluntary and that it was an investigative tool. The Jenners were then separated, but Ms. Jenner was again orally advised that she did not have to take the polygraph and she read and signed a consent form for taking the test. (SH 45, 71-72, 169). DCI Agent DeVaney administered the polygraph to Debra, which took about 90 minutes.

After the polygraph, Ms. Jenner was left alone briefly, then questioned by Agent Lindberg for 20 minutes. Agent DeVaney then replaced Agent Lindberg and questioned Ms. Jenner, until he perceived that she was viewing him negatively because he was not a born-again Christian. At about 5:00 Agent DeVaney asked if Ms. Jenner would be willing to continue the interview with DCI Agent Giegling and she agreed to do so. Throughout her questioning, Ms. Jenner was always free to leave the interrogation room without permission, and the door was left open several inches. (SH 37,74, 76, 100, 192). In fact, Ms. Jenner was left alone several times and did leave the room at least twice without permission in order to go to the bathroom. (SH 37, 74, 170, 191). She was also offered and given a Diet Coke. (SH 192-193). Though the questioning was accusatory at times (SH-81), Ms.Jenner was not threatened or told she could not leave (SH 109, 191),

and at no time did she ask to end the interview. (SH 22-23, 47, 54, 73, 108,190-191). In fact, she repeatedly consented to the continuation of the interview when asked and even made numerous expressions of a desire to help; she even volunteered to try hypnosis. (SH 67, 76, 100).

Agent Giegling testified that he periodically raised his voice (SH 120) and on one occasion put a hypothetical to Ms. Jenner concerning how she would feel if her husband put the blame on her. (SH 131).[1] The dissent in the state court opinion makes much of the hypothetical question and the fact that this was a lengthy interview.

Ms. Jenner was young, in good health and is reasonably well educated. Given the lack of police coercion and Ms. Jenner's individual characteristics, it cannot be said that her will was overborne and her statements were not constitutionally involuntary.

B. Miranda Warnings.

Miranda warnings are only required if the person is subjected to custodial interrogation. *Jorgensen*, 871 F.2d at 728-730 (citations omitted). In other words, the person must be in custody or otherwise deprived of his/her freedom of action in any significant way before a questioning officer is required to read the person his/her

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[1] The majority and the dissent opinions at the state court level conflict on whether the agent told Ms. Jenner that her husband had said she did it or whether the agent put it as a hypothetical. An independent review of the record discloses that it was a hypothetical.

Miranda warnings. *U.S. v. Carter,* 884 F.2d 368, 370 (8th Cir. 1989).

The inquiry regarding a person's custodial situation focuses on whether, under the totality of the circumstances, a reasonable person in the suspect's position would have believed his "freedom of action was curtailed to a degree associated with formal arrest." *Carter,* 884 F.2d at 370.

Factors that commonly indicate custody include: the use of strong-arm tactics by the police; a police dominated atmosphere; and the placing of the suspect under arrest at the termination of the questioning. *United States of America v. Griffin,* 922 F.2d 1343 (8th Cir. 1990). Common factors that indicate there was not custody include: the suspect having been informed at the time that the questioning was voluntary, that he/she was free to leave or that he/she was not considered to be under arrest; the suspect's ability to enjoy unrestrained freedom of movement during questioning; and the fact that the suspect initiated the contact or voluntarily agreed to the official request to respond to questions. *Id.*

In Ms. Jenner's case, she was interrogated at the police station, but that alone is not determinative since noncustodial interrogations may be conducted at the police station. *Carter,* 884 F.2d at 371. Only two of the custodial indicators cited above were arguably present in the April 7 questioning of Debra Sue Jenner, the factors of police dominated atmosphere and deceptive questioning. The atmosphere was one of police domination. Though not continually in the presence of an officer, Ms. Jenner was separated from her family for questioning and was

questioned by several different officers. Also, as noted by the dissent in the state court opinion, the questioning did take place in a small room without windows, albeit the door was open.

As to the second custodial factor, the Court would not call the tactics employed by the officers "strong arm" tactics. The Court also does not believe that the officers lied to Ms. Jenner, but they implied that her husband might be willing to implicate her. Given her emotional state, this might be considered deceptive tactics.

However, the third custodial factor, the taking of the suspect into custody at the end of the questioning, was not done and more importantly, all of the factors which mitigate against custody were present in Ms. Jenner's case. It is clear that Ms. Jenner possessed unrestrained freedom of movement during the questioning, since she felt free to leave the room without permission. As noted above, Ms. Jenner voluntarily came to the police station and voluntarily continued to answer questions. Though she was never told that she did not have to answer the questions put to her, she was asked several times if she was willing to continue with the interview. A normal person would realize that if the officials were repeatedly asking if she wished to proceed, she could terminate the questioning or leave, if she so desired. This is especially true in view of her unrestrained freedom of movement.

Four of the six factors cited by the *Griffin* opinion indicate a non-custodial situation, and a fifth factor, that of the police tactics, only marginally favors a finding of custody. Given the circumstances of Ms. Jenner's interview of April 7, 1987, a reasonable person would not feel

her freedom of action had been so curtailed as to amount to a formal arrest. After a careful consideration of the totality of the circumstances in this case and the Eighth Circuit authorities, I conclude that the questioning of Mrs. Jenner took place in non-custodial circumstances, and that her statements were admissible notwithstanding the failure of advise her of the *Miranda* warnings.

However, because of the length of the questioning and its taking place at the police station, this case presents a very close question. I share the frustration expressed by the Eighth Circuit panel in the *Griffin* case, 922 F.2d at 1355-1356. The failure of the investigators to advise Mrs. Jenner of her Miranda rights has resulted in an inordinate amount of time being required to consider this case in this court, and presumably also in the South Dakota Supreme Court in view of the 3 - 2 decision.

II. JURY INSTRUCTIONS

Improper jury instructions are not generally a ground for federal habeas relief. *Berrisford v. Wood*, 826 F.2d 747, 752 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988). It is only when the alleged error created a fundamental defect that "resulted in a complete miscarriage of justice or so infected the entire trial as to deprive the defendant of a fair trial" that jury instructions may be used for granting a habeas writ. *Id. (citing Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Williams v. Lockhart*, 736 F.2d 1264, 1267 (1984)). A defendant is only entitled to a jury instruction on his theory or defense if there is evidence to support it and he has made a timely request. *United States Ex. Rel. Means v. Solem*, 646 F.2d 322, 328 (8th Cir. 1980).

In this case there was no error in refusing to grant the instructions on unconsciousness because there was no evidence to support such instructions. Under South Dakota law, the defense of unconsciousness is defined in SDCL 22-3-1 (4):

> Any person is capable of committing a crime, except those belonging to the following classes: . . . (4) Persons who committed the act charged without being conscious thereof.

The Supreme Court of South Dakota discussed this issue in Jenner's direct appeal and found that most American courts have recognized an unconsciousness defense only when the defendant's condition is brought about by physical causes such as epilepsy, somnambulism, hypnotism, or physical or emotional trauma. The court went on to state that amnesia alone is not a defense to a crime and it is not the same as an unconsciousness defense. *State v. Jenner*, 451 N.W.2d at 721 (*citing State v. Caddell*, 287 N.C. 266, 285, 215 S.E.2d 348, 360 (1975)). This court is not at liberty to say that the South Dakota Supreme Court was incorrect in its interpretation of South Dakota law; thus, the state of the law in South Dakota is that an unconsciousness defense is not equal to a defense based on amnesia..

Ms. Jenner's claims relative to her unconsciousness defense allege only amnesia. She states that she does not remember committing the crime, that she may have "psyched out" and that she slept all night the night Abby was killed. This is insufficient evidence to establish unconsciousness as opposed to amnesia. There is no evidence that Ms. Jenner was prone to periods of unconsciousness or suffered from any condition that might cause her to do

so. Self-serving statements that a defendant cannot remember or might have psyched out, without more, cannot serve as the basis of an unconsciousness defense. If that were the case, any defendant could claim the same and be entitled to an instruction of the defense of unconsciousness.

Since there was no error in the trial court's refusal to give instructions on the defense of unconsciousness this basis for habeas relief is without merit.

III. REFUSAL TO ADMIT THIRD PARTY PERPETRATOR EVIDENCE.

The question of admissibility of evidence is a state law question and can only serve as a basis for federal habeas relief if the challenged ruling created an error that infringed on a constitutional right or "is so grossly or conspicuously prejudicial that it fatally infected the trial and denied the defendant the fundamental fairness that is the essence of due process." *Berrisford*, 826 F.2d at 749.

Ms. Jenner alleges that she was entitled to present third party perpetrator evidence and the denial of the opportunity to do so was a violation of her rights to due process and a fair trial. The evidence she wished to present was the following:

1. The next door neighbor had obtained a restraining order against her ex-husband.

2. The night of the murder a woman called the next door neighbor's house at 1:50 a.m. asking for the ex-husband.

3. A guest at the party saw a man she did not know walking near the Jenner home at 11:30 p.m.

4. Eight days after Abby was buried a man dressed similarly to the man seen the night of the murder, was seen walking in the cemetery where she was buried.

The trial court excluded the above evidence on the basis that its admission was not needed and that it would only confuse the jury. After a complete examination of the record, this Court does not find that ruling to be erroneous. The fact that the next door neighbor had problems with her husband and that someone called his former residence looking for him seems to be totally irrelevant, or at least so marginally relevant that the admission of these facts would only be confusing. The next two items on the list of refused evidence are not related to the first two at all. If the ex-husband of the next door neighbor had anything to do with the crime, he would not be a man that no one recognized. Furthermore, the fact that someone saw a man they did not know walking in the area proves nothing whatsoever. Likewise the cemetery information means nothing. Someone being **similarly dressed** (not of a similar physical description) to a stranger seen in the area the night of the murder and in **some** part (not necessarily the area of Abbey's grave) of the cemetery where Abby is buried is totally irrelevant without more evidence to link these events to the crime, or at least to each other. The refusal to admit the proffered third party perpetrator evidence was proper and clearly did not fatally infect the whole process of the trial.

CONCLUSION

The petition for habeas corpus must be denied. the statements given by Jenner and used at trial were not given in a custodial setting and were not involuntary, so there was no constitutional violation in their admission. The jury instructions and evidentiary rulings were not erroneous, so could not deprive the defendant of due process.

Now, therefore,

IT IS ORDERED:

(1) That the petition for habeas corpus is denied with prejudice.

Dated this 26th day of September, 1991.

BY THE COURT:
/s/ John Illegible
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
BY: Jackie Meisenheimer
DEPUTY
(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3554

Debra Sue Jenner, Plaintiff – Appellant, v. James Smith, Superintendent, Springfield Correctional Facility; Roger Tellinghuisen, Attorney General, State of South Dakota, Defendants – Appellees.	*	Appeal from the United States District Court for the District of South Dakota.

Submitted: June 10, 1992

Filed: January 5, 1993

Before BOWMAN, LOKEN, Circuit Judges, and LARSON,* Senior District Judge.

LOKEN, Circuit Judge.

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* The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

Debra Sue Jenner is a South Dakota inmate serving a life sentence for the murder of her three-year-old daughter. She appeals the district court's[1] denial of her petition for a writ of habeas corpus, arguing that her constitutional rights were violated by the admission of involuntary incriminating statements made during lengthy police interviews that were not preceded by *Miranda* warnings. We affirm.

I.

Prior to trial, Jenner moved to suppress the statements. After a thorough evidentiary hearing, the Beadle County Circuit Court denied the motion, filing both a lengthy Memorandum Opinion and detailed findings of fact and conclusions of law in which the court determined that the statements were voluntarily made during noncustodial questioning. Following Jenner's conviction, a divided Supreme Court of South Dakota affirmed, filing three opinions that discussed these issues in great detail. *State v. Jenner*, 451 N.W.2d 710 (S.D. 1990). The dissenters sharply criticized the police officers for questioning Jenner at length without giving *Miranda* warnings, and for failing to tape record the interviews.[2] Our only task as a

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[1] The HONORABLE JOHN B. JONES, United States District Judge for the District of South Dakota.

[2] The record suggests that the available tape recording equipment was not operable on April 7. We note that, in federal criminal cases, other circuits have held that incriminating statements are not inadmissible simply because the police failed to record or take notes of the conversations. See *United States v. Short*, 947 F.2d 1445, 1451 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1680 (1992), and cases cited.

federal habeas court, however, is to determine whether Jenner's constitutional rights were violated.[3]

While we review the ultimate issue of voluntariness de novo, subsidiary factual determinations made by the state courts are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *See Miller v. Fenton*, 474 U.S. 104, 112 (1985); *Hill v. Lockhart*, 927 F.2d 340, 346 (8th Cir.), *cert. denied*, 112 S. Ct. 344 (1991). We have carefully reviewed the record of the state court proceedings, most particularly the transcript of the evidentiary hearing on Jenner's motion to suppress. We conclude that the state court proceedings satisfied the criteria set forth in § 2254(d)(1)-(7), that its factual determinations are "fairly supported by the record," *see* § 2254(d)(8), and that Jenner has failed "to establish by convincing evidence that the factual determination[s] by the State court [were] erroneous." § 2254(d). Therefore, we must accept those findings and ignore the many fact assertions in Jenner's brief that are inconsistent with the explicit findings of the South Dakota trial court. *See Sumner v. Mata*, 449 U.S. 539 (1981); *Woods v. Armontrout*, 787 F.2d 310, 313 (8th Cir), *cert. denied*, 479 U.S. 1036 (1986).

II.

Three-year-old Abby Jenner was found murdered in her bed on Sunday morning, April 5, 1987. Her body was

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[3] Jenner's contention that the South Dakota Supreme Court applied the wrong standard of review to the voluntariness issue does not state an independent ground for federal habeas corpus relief.

mutilated by a frenzy of seventy stab wounds inflicted in a prolonged attack the previous night, when only Abby's mother, father, and five-year-old brother were in the Jenner house. Police discovered no signs of forced entry into the house, and found, in plain view atop the kitchen microwave, a Chicago Cutlery knife consistent with the slash wounds on Abby's body.

For the next two days, Jenner and her husband, Lynn Jenner, cooperated extensively with the investigating law enforcement officers. They consented to two interviews on April 5, first at the hospital with Beadle County Sheriff Tom Beerman, and later at their home with Agent Jerry Lindberg of the South Dakota Division of Criminal Investigation (DCI). The Jenners signed a written consent permitting the investigators to search their home and car. They provided hair samples and submitted the clothing and jewelry they had worn the night of the murder for forensic analysis.

On the morning of April 7, the investigators decided to ask the Jenners to submit to polygraph examinations. Sheriff Beerman called Lynn Jenner and asked if they would come to the Beadle County Public Safety Building to answer additional questions, at a time convenient to them. At 1:55 that afternoon, the Jenners arrived in their own vehicle, accompanied by their pastor and by Lynn's parents. Agent Lindberg asked if they would consent to polygraph examinations and advised that they did not have to take a polygraph test or talk further with the investigators; that the test was an investigative tool that could implicate or eliminate them as suspects; that the test results could not be used in court; and that they would be questioned further if they did not pass the test.

After signing consent forms, the Jenners went to separate rooms to take the polygraph tests.

Jenner's polygraph testing ended about 3:30 p.m. Her test results indicated deception. After reviewing the results, the DCI Agent who administered the test, Fred DeVaney, returned to the room and told Jenner that she had lied and that she was responsible for Abby's death. Agent Lindberg then interviewed Jenner for about twenty minutes, following which Agent DeVaney spoke with her for about one hour. Around 5:00 p.m., Jenner agreed to talk to DeVaney's partner, DCI agent Ken Giegling, who interviewed her until about 9:30 p.m.

All the interviews took place in the small room where Jenner had taken the polygraph test. Only one interviewer was in the room with Jenner, and the door was kept slightly ajar. Devaney left the room on one occasion and upon returning found that Jenner had left to use the bathroom and returned on her own initiative. DeVaney also left the room to get Jenner a Diet Coke at her request. Lindberg described Jenner's mood during his interview as "chang[ing] within seconds from angry to crying to very calm." Devaney said Jenner was in tears sometimes, and was at other moments calm and inexpressive. Giegling described her demeanor as wildly varied, from vacant calm to extreme distress.

Throughout these interviews, Jenner continually expressed a desire to cooperate in the investigation by getting to the bottom of her adverse polygraph test results. She told Lindberg, "I'm not lying and know I didn't do this, but maybe I psyched out in the night and don't remember it." She asked each interviewer whether

she could have "psyched out" and repeatedly offered to undergo hypnosis, psychological interviews, or any other method that might reveal whether she had killed Abby. She told Agent Giegling she wanted him to be "the vehicle to jar her memory."

Each of the three interviewers told Jenner that she was responsible for Abby's death. They used a variety of questioning techniques aimed at drawing more information from her, such as prefacing questions with the assurance that Jenner was at bottom a good mother and a good Christian, and telling Jenner that there was a "bad Debbie" who was responsible for Abby's death. Giegling raised his voice on several occasions, and accused Jenner of not being truthful. At one point, Giegling asked, hypothetically, what Jenner would think if her husband was at that moment "putting all the blame on her."

Jenner never formally confessed to killing Abby, but she did make at least three damaging admissions during the course of the interviews. First, she frequently qualified her denials by suggesting the possibility that she had "psyched out." More significantly, during Giegling's interview Jenner volunteered a description of the murder as seen through Abby's eyes. "Abby knew the person and was not afraid. Abby saw a knife," Jenner said with a different, higher pitched voice, and then described a Chicago Cutlery knife identical to the one found atop the microwave. "Abby saw a black object," Jenner said, and then described a black model airplane, later found in the Jenner house, that matched a unique wound on Abby's body. She also said the assailant's hair hung down over Abby's crib; hair matching either Jenner's or Abby's was

found in Abby's hands. Giegling interrupted this narrative to ask, "Is that person leaning over your daughter you?" Jenner said, "I think so." The final admission occurred at the end of the interviews, when Jenner was briefly reunited with her husband. The officers present testified that, when she saw her husband, Jenner cried out, "I did it, I did it. Did you help me?" Lynn said he had not helped.

Sometime after 9:00 p.m., Giegling terminated the interview, being concerned that Jenner might be nearing a nervous breakdown. A police psychologist was summoned. After advising Jenner that their conversation would not be privileged, he talked with her and concluded that she was alert and aware, was not suffering from any psychological dysfunction, and was not a threat to herself. The police then drove Jenner to the pastor's house, where the family was waiting to take her home. She was not arrested until four months later, when a grand jury indicted her on charges of second degree murder and first degree manslaughter.

Before trial, Jenner moved to suppress her April 7 incriminating statements. Jenner, her husband, the three interviewing officers, and the psychologist testified at the suppression hearing. The state court found that Jenner was aware that she did not have to take the polygraph or answer any questions, was never threatened or restrained in any way, never asked that the questioning stop or an attorney be present, and never expressed a desire to leave. Although Jenner testified that she believed she was not free to leave, the trial judge expressly discredited that testimony. The court concluded that the statements "were freely and voluntarily given and were not the result of

compulsion or inducement of any sort." In addition, the court concluded that the officers' failure to give *Miranda* warnings did not require suppression of the statements because Jenner did not undergo "custodial interrogation."

At trial, the prosecution introduced the April 7 incriminating statements through the testimony of the interviewing officers, as well as substantial additional circumstantial evidence of Jenner's guilt. *See State v. Jenner,* 451 N.W.2d at 711-14. Jenner took the stand in her own defense, denied killing Abby, and explained that her April 7 statements were the result of stress, exhaustion, and suggestive questioning. The jury convicted her of second degree murder, and she was sentenced to life imprisonment. After the Supreme Court of South Dakota upheld her conviction on direct appeal, she filed this petition for habeas corpus relief.[4]

The district court denied relief. The court first concluded that the April 7 statements were constitutionally voluntary. Jenner "was at the police station voluntarily and remained there voluntarily," and "she repeatedly consented to the continuation of the interview when asked and even made numerous expressions of a desire to help." Finding that Jenner was young, in good health, and well educated, and an absence of improper police coercion, the court determined that "it cannot be said that her will was overborne." Turning to the *Miranda* issue, the district court criticized the officers' failure to provide

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[4] Appellees concede that Jenner adequately exhausted her state remedies.

Miranda warnings but concluded, after analyzing the six factors set forth in *United States v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990), that the questioning "took place in non-custodial circumstances." This appeal followed.

III.

Jenner first argues that her April 7 statements were involuntary. To merit habeas corpus relief on this claim, Jenner has the burden of proving that she made the April 7 statements only after her "will was overborne and [her] capacity for self-determination critically impaired." *Sumpter v. Nix*, 863 F.2d 563, 565 (8th Cir. 1988) (citation omitted). Although Jenner's ability to resist interrogation pressures is relevant to the voluntariness inquiry, her mental condition alone cannot make the April 7 statements involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 165 (1986). A statement is not constitutionally involuntary unless "the police extorted it from the accused by means of coercive activity." *United States v. Rohrbach*, 813 F.2d 142, 144 (8th Cir.), *cert. denied*, 482 U.S. 909 (1987); *see United States v. Goudreau*, 854 F.2d 1097, 1099 (8th Cir. 1988). We review the issue of voluntariness de novo, giving "great weight to the considered conclusions of a coequal state judiciary." *Miller v. Fenton*, 474 U.S. 104, 112 (1985).

After cooperating extensively with the investigators for two days, Jenner voluntarily came to the April 7 interviews at a time of her own choosing, knowing that the purpose was additional questioning. She consented to a polygraph test after being advised that she need not take the test nor answer further questions. After the

polygraph was completed, Jenner was left alone in the testing room from time to time. She left the room at least once on her own and remained in the room answering questions without any reasonably perceived restraint. Jenner's repeated suggestions that she undergo hypnosis or some other procedure that would "jar her memory" conveyed a desire, or at least a willingness, to continue the interview sessions.

The lengthy April 7 interviews were completely devoid of physical threats or coercion. Moreover, the interviewing officers used no improperly coercive questioning tactics. It was not improper to inform Jenner that her polygraph test results indicated deception, *see Bae v. Peters*, 950 F.2d 469, 475 (7th Cir. 1991), nor to resume questioning her as the officers had said they would if the test results were adverse. It was likewise permissible to elicit further statements by claiming not to believe her denials. *See United States v. Wolf*, 813 F.2d 970, 975 (9th Cir. 1987). Numerous cases have held that questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. *See, e.g., Miller v. Fenton*, 796 F.2d 598, 607 (3d Cir.), *cert. denied*, 479 U.S. 989 (1986); *Martin v. Wainwright*, 770 F.2d 918, 925-27 (11th Cir. 1985). "[T]here is nothing inherently wrong with efforts to create a favorable climate for confession." *Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir.), *cert. denied*, 488 U.S. 900 (1988). As the Supreme Court said in *Schneckloth v. Bustamonte*, 412 U.S. 281, 224 (1973), "very few people give incriminating statements in the absence of official action of some kind."

Thus, Jenner's involuntariness claim rests upon the contention that it was inherently coercive to question her at length, without full *Miranda* warnings, and under obviously stressful conditions. These are highly relevant circumstances requiring careful evaluation. But Jenner still must prove that her incriminating statements were the product of an overborne will. *See Evans v. Dowd*, 932 F.2d 739, 741-43 (8th Cir.), *cert. denied*, 112 S. Ct. 385 (1991). "Any interview of one suspected of a crime will have coercive aspects to it." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). The fact that the questioning extended for six or seven hours is not per se unconstitutionally coercive. *See Stein v. New York*, 346 U.S. 156, 185-86 (1953) (twelve hours of intermittent questioning over a 32-hour period); *Sumpter*, 863 F.2d at 565 (seven and one-half consecutive hours).

The state court found willing participation by Jenner *and* the absence of improper questioning tactics by the investigating officers. At no time did Jenner express a desire to halt the interviews or to speak with an attorney. *See United States v. Jorgensen*, 871 F.2d 725, 730 (8th Cir. 1989). The testimony of the psychologist who evaluated Jenner immediately after the interviews confirmed that she was still alert and in control of her faculties after the lengthy questioning. On this record, we agree with the district court that Jenner – an adult woman with a college degree – has failed to demonstrate that the officers overwhelmed her will and "extorted" the incriminating statements from her. *Compare Ashdown v. Utah*, 357 U.S. 426 (1958); *McCall v. Dutton*, 863 F.2d 454, 461 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

IV.

Jenner also claims that the April 7 statements were obtained in violation of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The state courts concluded that *Miranda* warnings were not constitutionally required because Jenner was not in custody when she was interviewed on April 7, 1987. We review this custody finding under the clearly erroroneous standard. *See Carlson v. Minnesota*, 945 F.2d 1026, 1028 (8th Cir. 1991).

Custodial interrogation requiring *Miranda* warnings occurs when "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citation omitted). Warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Mathiason*, 429 U.S. at 495. Like voluntariness, the custody issue necessarily focuses upon the totality of the circumstances.

In *Griffin*, 922 F.2d at 1349, we enumerated six "common indicia of custody." The district court concluded that Jenner was not in custody on April 7 because "[f]our of the six [*Griffin*] factors . . . indicate a non-custodial situation, and a fifth factor, that of police tactics, only marginally favors a finding of custody." We agree with this analysis. *See United States v. Mottl*, 946 F.2d 1366, 1370 (8th Cir. 1991) (warnings not required when five of the six *Griffin* indicia supported a finding that defendant was not in custody at FBI headquarters).

In addition, we note that the *Griffin* factors are not all of equal weight in each case. Here, Jenner had cooperated

with the police investigators for two days, voluntarily came to the police station to answer further questions, was advised at the outset that she need not take the polygraph test or submit to further questioning, had obvious freedom to leave at various times during the questioning, and was not arrested even after making incriminating statements. In these circumstances, the finding that Jenner was not in custody on April 7, 1987, is not clearly erroneous.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.